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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1464

STATE OF ILLINOIS,

Petitioner,

vs.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX TO PETITION

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	22
Appendix A—Opinion of the Court of Appeals for the Seventh Circuit	A1
Appendix B—Opinion of the District Court for the Southern District of Illinois	B1
Appendix C—Order of the District Court for the Southern District of Illinois	C1

TABLE OF AUTHORITIES

CASES

PAGE

Bill Minielli Cement Contracting, Inc. v. *Richter Concrete Corp.*, 62 F.R.D. 381 (S.D. Ohio 1973) 11

Blounder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971) 12, 16

Buckeye Powder Co. v. *E. I. duPont de Nemours Powder Co.*, 248 U.S. 55 (1918) 16

Butler v. *Stover Brothers Trucking Co.*, 546 F. 2d 544 (7th Cir. 1977) 9

Citizens Comm. for Broadcasting v. *F.C.C.*, 555 F. 2d 938 (D.C. Cir. 1977), *aff'd in part, rev'd in part on other grounds*, —— U.S. —— 98 S. Ct. 2096 (1978) . 20

City of Burbank v. *General Electric Co.*, 329 F. 2d 825 (9th Cir. 1964) 17

Commonwealth Edison Co. v. *Allis-Chalmers Mfg. Co.*, 323 F. 2d 412 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964) 13

Connecticut Fire Ins. Co. v. *Ferrara*, 277 2d 388 (8th Cir. 1960) 18

Emich Motors Corp. v. *General Motors Corp.*, 181 F. 2d 70 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 558 (1951) 7, 13, 15, 18

Fleer Corp. v. *Topps Chewing Gum, Inc.*, 415 F. Supp. 176 (E.D. Pa. 1976), *appeal dismissed*, (3rd Cir.), *cert. denied*, —— U.S. ——, 98 S. Ct. 1611 (1978) ..14, 21

Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495 (1969) 7

Illinois v. *Huckaba & Sons Construction Co.*, 442 F. Supp. 56 (S.D. Ill. 1977) 20

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 7, 19

In re Gypsum Antitrust Cases, Civil No. 46414-A (N.D. Cal., Dec. 22, 1971) 11

J. I. Case v. *Borak*, 377 U.S. 426 (1964) 18

Johnson v. *United States*, 576 F. 2d 606 (5th Cir. 1978) 9

J. M. Woodhull, Inc. v. *Addressograph-Multigraph Corp.*, 62 F.R.D. 58 (S.D. Ohio 1974) 11

Leh v. *General Petroleum Corp.*, 382 (U.S. 54 (1965) .. 7

McCook v. *Standard Oil Co. of California*, 393 F. Supp. 256 (C.D. Cal. 1975) 14

Moragne v. *States Marine Lines*, 398 U.S. 375 (1970) . 18

Minnesota Mining & Mfg. Co. v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) 7, 18, 19

Parklane Hosiery Co. v. *Shore*, —— U.S. ——, 99 S. Ct. 645 (1979) 8, 9, 10, 12

Perma Life Mufflers v. *International Parts Corp.*, 392 U.S. 134 (1965) 7

Plunkett v. *C.I.R.*, 465 F. 2d 299 (7th Cir. 1972) 9

Poster Exchange, Inc. v. *National Screen Service Corp.*, 517 F. 2d 117 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) 9

Purex Corp. v. *Proctor & Gamble Co.*, 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd on other grounds*, 453 F. 2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972) 14

Rail Re-organization Act Cases, 419 U.S. 102 (1974) .. 20

Red Lion Broadcasting Co. v. *F.C.C.*, 395 U.S. 367 (1969) 19

Sam Fox Publishing Co. v. *United States*, 366 U.S. 683 (1961) 10, 13

Scooper Dooper, Inc. v. *Kraftco, Inc.*, 494 F. 2d 840 (3d Cir. 1974) 9

Shaw v. *North Penn. R. Co.*, 101 U.S. 557 (1880) 18
Simco Sales Service of Pa. v. *Air Reduction Co.*, 213 F. Supp. 505 (E.D. Pa. 1963) 18
Tennessee Valley Authority v. *Hill*, —— U.S. ——, 98 S. Ct. 2279 (1978) 19
United States v. *American Trucking Assn's*, 310 U.S. 534 (1940) 19
United States v. *Huckaba & Sons Construction Co.*, S-CR-74-3 (S.D. Ill. 1974) 4
United States v. *Ryan*, 284 U.S. 167 (1931) 21
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 20
United States v. *Turley*, 352 U.S. 407 (1957) 20
United States v. *Wise*, 370 U.S. 405 (1962) 19, 20
Usery v. *Intern. Organization of Masters, Etc.*, 422 F. Supp. 1221 (S.D. N.Y. 1976) 9
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 7

STATUTES

Act of July 7, 1955, Pub. L. No. 137, 69 Stat. 282-83 .. 17
Clayton Act, 15 U.S.C. § 15 4
Clayton Act, 15 U.S.C. § 16 .....passim
Sherman Act, 15 U.S.C. § 1 4
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(b) 5
28 U.S.C. § 2101(c) 2

RULES

Fed. R. Civ. P. 56(a) 4
Advisory Committee Note, Fed. R. Evid. 803 (22) 18

LEGISLATIVE MATERIALS

Bills

H.R. 7905, 81st Cong., 2d Sess. (1950) 17
S. 2512, 89th Cong., 2d Sess. (1966) 17
H.R. 7647, 98th Cong., 2d Sess. (1978) 17

Reports

H.R. Rep. No. 627, 63d Cong., 2d Sess. 14 (1914) 15
S. Rep. No. 698, 63rd Cong., 2d Sess. 45 (1914) 15, 16
H.R. Rep. No. 422, 84th Cong., 1st Sess. (1955) 21
S. Rep. No. 619, 84th Cong., 1st Sess. *reprinted in* U.S. Cong. Codé & Admin. News 2328 (1955) 21

Congressional Record

51 Cong. Rec. 1964 15
51 Cong. Rec. 9200 16
51 Cong. Rec. 13853 16
51 Cong. Rec. 13907 16
51 Cong. Rec. 15939 16
51 Cong. Rec. 16058 16
51 Cong. Rec. 16276 16

OTHER AUTHORITIES

Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. Law & Econ. 365 (1970) 6

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STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on January 11, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The decision of the District Court for the Southern District of Illinois, which was reversed by the Court of Appeals, is reported at 442 F. Supp. 56 (S.D. Ill. 1977), and appears in Appendix B hereto. The order of the District Court entering partial summary judgment appears in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 11, 1979. A petition for rehearing and suggestion for rehearing en banc was filed on January 25, 1979, and was denied on February 9, 1979. A motion to stay the mandate was then filed with the Court of Appeals on February 16, 1979. An order staying the court's mandate was entered on February 22, 1979. This petition for certiorari was timely filed within 90 days of the entry of judgment, pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE EXERCISE OF THE COMMON LAW DOCTRINE OF COLLATERAL ESTOPPEL IS PREEMPTED BY THE PRIMA FACIE EVIDENTIARY BENEFIT GRANTED TO PRIVATE ANTITRUST PLAINTIFFS UNDER SECTION 5(a) OF THE CLAYTON ACT.

STATUTE INVOLVED

Clayton Act, Section 5(a) (15 U.S.C. § 16).

Section 16. Judgment in favor of Government as evidence; suspension of limitations

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 15a of this title.

STATEMENT OF THE CASE

On January 17, 1974, a federal grand jury returned an indictment charging Respondents with a violation of §1 of the Sherman Antitrust Act, 15 U.S.C. § 1. On July 16, 1974, Respondents were convicted after a seven day trial by jury.[1]

On June 19, 1975, the Petitioner filed its civil complaint seeking treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, from the same defendants convicted in the federal action. Petitioner's complaint alleged the same antitrust violation contained in the federal indictment, and all three civil defendants filed answers denying liability.

On May 4, 1977, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, the Petitioner moved for partial summary judgment against the civil defendants relying on the prior federal criminal judgments. Petitioner asserted that the judicial doctrine of collateral estoppel precluded the civil defendants from relitigating those common issues of fact that had been adjudicated against them in the prior criminal case.

On December 14, 1977, District Judge J. Waldo Ackerman filed a memorandum order holding that collateral estoppel could properly be invoked by the Petitioner to preclude the civil defendants from contesting their liability under the antitrust laws. The court reasoned that the evidentiary benefit granted to private plaintiffs under § 5(a) did not preempt the exercise of the common law doctrine of col-

1. *United States of America* v. *Huckaba & Sons Construction Co.*, S-CR-74-3 (S.D. Ill. 1974). Huckaba, a third defendant, was also indicted and was convicted on a plea of guilty. Huckaba did not appeal from the judgment entered below in the civil action.

lateral estoppel. Pursuant to 28 U.S.C. § 1292(b), the District Judge certified his order for interlocutory appeal. On February 16, 1978, Judge Ackerman granted Petitioner's motion for partial summary judgment upon a finding that the criminal and civil actions involved identical facts. *See* Appendix C.

On March 21, 1978, the Seventh Circuit Court of Appeals granted Respondent's petition for permission to appeal. Thereafter, Respondents also filed with the same court a motion to withdraw and dismiss the appeal voluntarily. On July 3, 1978, the court denied this motion. Briefs were then submitted by all parties.[2]

On January 11, 1979, the Court of Appeals reversed the order of the District Court. The Seventh Circuit held that by enacting § 5(a), Congress intended to preempt the use of collateral estoppel in private antitrust actions which follow Government suits. The Court indicated that a prior Government judgment could be nothing more than prima facie evidence in a subsequent suit. In the Seventh Circuit's view, prior decisions of this Court and other lower federal courts were controlling on the issue of § 5(a) preemption of the common law doctrine of collateral estoppel.

2. Orr Construction Company and Arcole Midwest Corporation, defendants in other similar cases brought by the State of Illinois, were permitted by the Court to file briefs as amici curae.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES IMPORTANT AND RECURRING QUESTIONS CONCERNING THE ADMINISTRATION OF THE ANTITRUST LAWS AND THE EFFICACY OF THE TREBLE DAMAGE ACTION.

The Seventh Circuit's conclusion that the common law doctrine of collateral estoppel is unavailable to private antitrust litigants will have an adverse impact that reaches far beyond the instant case. Treble damage actions almost invariably follow on the heels of United States Department of Justice enforcement actions.[3] Thus, the decision below will require the unnecessary re-litigation of factual issues whenever a private suitor relies on the judgment or decree in a prior Government action.

The negative impact of the Seventh Circuit's decision on private antitrust litigation is readily apparent. The treble damage action, already the most tortuous of lawsuits, is made even more lengthy and complex by involving the courts

3. No comprehensive statistics, official or otherwise, are kept detailing the number of private suits that follow Government actions. The research of one law journal commentator, however, reveals that from 1890-1963, 62% of all private cases filed were preceded by Government judgments. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. Law & Econ. 365, 372 (1970). In the mid-60's, over 2,000 private electrical equipment cases were based on a few Government indictments.

Of the 18 federal civil actions currently being prosecuted by the Antitrust Division of the Illinois Attorney General's Office, 16 were preceded by Government cases.

and parties in discovery on, and re-proof of, issues that have already been adjudicated in the prior action. This is particularly wasteful when the prior Government suit was a criminal case where the burden of proof satisfied by the Government was greater than that required in the subsequent civil action.

The decision below also undermines "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 745 (1977). The decisions of this Court have repeatedly recognized the Congressional conviction that private antitrust litigation is "one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 337 (1971); *Leh* v. *General Petroleum Corp.*, 382 U.S. 54, 59 (1965). Private action was instituted by Congress "not merely to compensate those who have been indirectly injured but also to vindicate the important interest in free competition." *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502 (1969).

Certiorari has previously been granted where a decision of the Court of Appeals "threaten[ed] the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." *Perma Life Mufflers* v. *International Parts Corp.*, 392 U.S. 134, 136 (1965). This Court last considered the operation of § 5(a) of the Clayton Act 28 years ago in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951).

In view of the absence of an authoritative Supreme Court pronouncement on the application of collateral estoppel in private antitrust actions, the novelty of this issue, *see* Part II, *infra*, the recurring nature of this problem and the

negative effect that the lower court's decision will have on private antitrust litigation and the administration of justice in the federal judicial system as a whole, this case presents an important question of federal law which requires resolution by this Court.

II.

THE DECISION BELOW CONFLICTS, IN PRINCIPLE, WITH THE RECENT DECISION OF THIS COURT IN *PARKLANE HOSIERY CO.* v. *SHORE.*

In concluding that the common law doctrine of collateral estoppel is unavailable to private antitrust litigants, the Seventh Circuit ignored the rationale of this Court in *Parklane Hosiery Co.* v. *Shore,* —— U.S. ——, 99 S. Ct. 645 (1979), which endorsed the offensive use of collateral estoppel in federal civil litigation.[4] By so doing, the decision below creates an unnecessary and unwarranted anomaly in the application of the doctrine of collateral estoppel in the federal courts and frustrates considerations of judicial economy which underlay the *Parklane* decision. Furthermore, the Seventh Circuit failed to recognize the recent developments in the evolution of collateral estoppel in concluding that prior case law supported preemption of the doctrine's application in antitrust litigation.

A.

The *Parklane* Rationale Should Apply Equally To Antitrust Litigants.

In *Parklane,* this Court finally eradicated, as an element of collateral estoppel, the rule of mutuality of parties. The

4. *Parklane* was brought to the Seventh Circuit's attention in Petitioner's Motion For Rehearing.

rule held that unless both parties were bound by a prior judgment, neither party could use the prior judgment as determinative of an issue in the second action. After *Parklane,* a defendant who has had a "full and fair opportunity" to litigate his claims in a prior action will be collaterally estopped from re-litigating the same issues in a subsequent action brought by a third party. 99 S. Ct. at 652.

Mr. Justice Rehnquist's dissent in *Parklane* recognized that there was little reason why this Court's decision should not extend to private antitrust cases which follow Government actions. 99 S. Ct. at 662, n. 20. The Seventh Circuit, however, declined to follow *Parklane* and concluded that § 5(a) of the Clayton Act preempted the operation of offensive collateral estoppel.

Absent the "benefit" of the evidentiary presumption which § 5(a) statutorily creates, the doctrine of collateral estoppel would now be available to the petitioner. The defensive application of the doctrine has received judicial approbation in private antitrust actions not affected by § 5(a). *See Poster Exchange, Inc.* v. *National Screen Service Corp.,* 517 F. 2d 117, 122-23 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976); *Scooper Dooper, Inc.* v. *Kraftco, Inc.,* 494 F. 2d 840, 844-45 (3rd Cir. 1974). Offensive use of collateral estoppel has also been sanctioned in several fields of law other than antitrust, *i.e.,* securities, tort, tax and labor law. *See e.g., Parklane Hosiery Co.* v. *Shore, supra; Johnson* v. *United States,* 576 F. 2d 606 (5th Cir. 1978); *Butler* v. *Stover Bros. Trucking Co.,* 546 F. 2d 544 (7th Cir. 1977); *Plunkett* v. *C.I.R.,* 465 F. 2d 299 (7th Cir 1972); *Usery* v. *Intern. Organization of Masters, Etc.,* 422 F. Supp. 1221 (S.D.N.Y. 1976). There is no logical explanation why the salutary benefits of collateral estoppel should now be available to virtually all federal litigants except antitrust claimants who follow prior Government lawsuits.

In *Parklane*, this Court recognized that there may be situations where the offensive use of collateral estoppel is inappropriate. The Court noted that offensive use could increase, rather than decrease the total amount of litigation if a plaintiff could have been a party in a prior action, but chose not to. 99 S. Ct. at 651. Also, it was recognized that it would be inequitable to apply the doctrine where a defendant was sued for nominal damages in the first action and future suits were not forseeable. In such a situation the defendant might have little incentive to fully litigate the former action. *Id.*

These concerns, however, are totally inapplicable in the present case and in other private suits which follow Government litigation. As a matter of law, private plaintiffs cannot intervene in Government enforcement actions. *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683 (1961). Criminal antitrust defendants have every motivation to actively litigate a Government criminal action. They are fully cognizant of the possible criminal penalties if they are found guilty and they also know that treble damage actions will inevitably follow in the wake of a successful Government action.

Respondents herein had every incentive and opportunity to defend the criminal action fully and vigorously. After seven days of trial by jury, Respondents were found guilty beyond a reasonable doubt of the identical antitrust violation involved in this lawsuit.[5] To allow Respondents again to fully litigate the same issues in the same courtroom simply because they are faced with a new adversary is diametrically opposed to the basic purpose of the doctrine of collateral

5. In contrast, the defendant in *Parklane* did not even have a right to a jury trial in the prior S.E.C. proceeding. 99 S. Ct. at 648.

estoppel. Accordingly, the doctrine should be applied herein to prevent further needless re-litigation of identical issues.

According to the rationale of the decision below, if a non-antitrust claim had been joined to Petitioner's antitrust claim in the instant action, collateral estoppel would incongruously apply only to the non-antitrust claim. The confusion that would result from attempting to conduct a trial and instruct a jury in such circumstances is not difficult to visualize. The very same facts established in the prior Government litigation would be given conclusive, collateral estoppel effect as to the non-antitrust claim but prima facie effect as to the antitrust claim.

Moreover, the decision below would permit a private antitrust plaintiff to use a prior non-Government antitrust judgment to collaterally estop a defendant in a subsequent suit. *See J.M.Woodhull, Inc.* v. *Addressograph-Multigraph Corp.,* 62 F.R.D. 58, 61 (S.D. Ohio 1974); *Bill Minielli Cement Contracting, Inc.* v. *Richter Concrete Corp.,* 62 F.R.D. 381, 386 (S.D. Ohio 1973); *In re Gypsum Antitrust Cases,* Civil No. 46414-A (pre-trial order, N.D. Cal., Dec. 22, 1971) (findings in prior non-Government antitrust action given offensive collateral estoppel effect in subsequent private action). By its very terms, § 5(a) applies only to a prior Government judgment or decree and therefore would not preempt the application of collateral estoppel where the prior antitrust action was private.

B.

The Seventh Circuit Mistakenly Relied On Prior Case Law In Concluding That § 5(a) Preempted Offensive Collateral Estoppel.

The court below erred by relying upon prior cases, which merely interpreted the prima facie language of § 5(a), in

support of its conclusion that § 5(a) preempted the offensive application of the doctrine of collateral estoppel in private antitrust actions which follow Government suits. The *Parklane* decision was rendered on January 9, 1979. The case represents the first time that this Court has endorsed the offensive application of collateral estoppel. Ironically, on January 11, 1979, the court below rejected the offensive application of the doctrine in antitrust litigation, stating that "repeated judicial holdings after the evolution of the doctrine of collateral estoppel that Section 5(a) allows only prima facie effect must be given due weight." Appendix A at A7. With the exception of one district court decision, however, the cases relied on by the Seventh Circuit were decided at a time when the rule of mutuality forbade the offensive use of collateral estoppel. *See* Appendix A at A3, n. 3.

In *Parklane,* this Court specifically recognized that "[u]ntil relatively recently . . . the scope of collateral estoppel was limited by the doctrine of mutuality of parties." 99 S. Ct. at 649. In 1971, this Court for the first time endorsed the defensive use of collateral estoppel in non-mutality situations.[6] *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971). The *Blonder-Tongue* Court recognized that the rejection of the rule of mutuality was slow to develop:

> Of course, transformation of estoppel law was neither instantaneous nor universal. As late as 1961, eminent

6. *See* Mr. Justice Rehnquist's dissent in *Parklane* wherein he states: "The Court's decision in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971), is, on its facts, limited to the defensive use of collateral estoppel in patent cases. Abandonment of mutuality is a recent development." 99 S. Ct. at 659 n. 14

> authority stated that "[m]ost state courts, recognize and apply the doctrine of mutuality, subject to certain exceptions . . . . And the same is true of federal courts, when free to apply their own doctrine. (Citations omitted).

402 U.S. at 326-27. Even as late as 1971, the Court noted, courts and commentators had reservations about offensive use of collateral estoppel in non-mutuality situations. 402 U.S. at 330-31.[7]

The decisions chiefly relied on by the Seventh Circuit—*Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683 (1961); *Commonwealth Edison* v. *Allis-Chalmers Mfg. Co.,* 323 F. 2d 412 (7th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964); *Emich Motors Corp.* v. *General Motors Corp.,* 181 F. 2d 70 (7th Cir. 1950), *rev'd on other grounds,* 340 U.S. 558 (1951)—clearly pre-date the very recent extension of the doctrine of collateral estoppel. Thus, the Seventh Circuit was in error in relying on "repeated judicial holdings" which existed at a time when the rule of mutuality was still firmly entrenched.

It must also be noted that, contrary to the Seventh Circuit's interpretation, the question of preemption was never reached in the decisions relied on below. In *Emich,* the

7. In the court below, Respondents agreed that offensive use is a very recent development:

> Even today, while there are some instances outside the antitrust field in which judges have permitted the offensive application of collateral estoppel, the vast majority of courts appear to have countenanced only the defensive use of the doctrine.

Reply Brief of General Paving Co. and F. F. Mengel Co., filed in *State of Illinois* v. *General Paving Co.,* No. 78-1479 (7th Cir.) at 9.

court only addressed the scope of the prima facie presumption; the interplay between § 5(a) and the doctrine of collateral estoppel was never considered. In *Commonwealth Edison,* the court considered whether guilty pleas could be given prima facie effect. The question of preemption was not an issue.

In *Sam Fox,* the issues before the Court were whether a private party could intervene in a Government antitrust action, and, if not, whether a third party would be bound by the judgment rendered therein. The Court concluded that although intervention by a private party was improper, the private litigant was not foreclosed from bringing its own antitrust suit by the prior Government action. The existence of § 5(a) was relied on as support for the Court's conclusion that a Government enforcement action is not res judicata as to a private plaintiff's antitrust claim. The *Sam Fox* Court did not, as the Seventh Circuit apparently believed, rule on the question of the preemption of collateral estoppel in private antitrust actions that follow enforcement suits. *See* Appendix A at A3.

With the exception of one district court decision, *Purex Corp.* v. *Proctor & Gamble Co.,* 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd on other grounds,* 453 F. 2d 288 (9th Cir. 1971), *cert. denied,* 405 U.S. 1065 (1972), no other court has decided the issues presented by the instant appeal. Other lower courts have recognized that the question is unsettled. *See Fleer Corp.* v. *Topps Chewing Gum, Inc.,* 415 F. Supp. 176 (E.D. Pa. 1976), *appeal dismissed,* (3d Cir.), *cert. denied,* —— U.S. ——, 98 S. Ct. 1611 (1978); *McCook* v. *Standard Oil of California,* 393 F. Supp. 256 (C.D. Cal. 1975) (both decided on other grounds) Thus, the questions presented by this case are both important and novel, requiring resolution by this Court.

III.

THE DECISION BELOW FRUSTRATES THE INTENT OF CONGRESS TO FOSTER THE USE OF PRIOR GOVERNMENT ANTITRUST JUDGMENTS AND IS BASED UPON AN ERRONEOUS APPLICATION OF PRINCIPLES OF STATUTORY CONSTRUCTION.

By construing § 5(a) of the Clayton Act as preemptive of the common law doctrine of collateral estoppel, the Seventh Circuit has effectively held that a statute which was originally enacted to single out antitrust plaintiffs and provide special evidentiary benefits to them in the use of prior judgments, should now be interpreted as a denial to those same plaintiffs of additional common law benefits available to all other federal litigants.

The passage of § 5(a)[8] in 1914 was a manifestation of both Congressional and executive intent to aid private parties who had been injured by violations of the antitrust laws. *See* H. R. Rep. No. 627, 63 Cong., 2d Sess. 14; S. Rep. No. 698, 63 Cong. 2d Sess. 45; 51 Cong. Rec. 1964 (address of President Wilson) (1914). By making available to private plaintiffs all matters previously established in a prior Government action, Congress felt that it could greatly ease the burden of proof facing an injured private party. *Emich Motors Corp.* v. *General Motors Corp.,* 340 U.S. 558, 568 (1951).

The final version of the bill proposed in the House provided that a prior Government judgment would be conclusive evidence in a subsequent private suit. 51 Cong Rec.

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8. As enacted in 1914, there were no subdivisions in § 5. Later amendments gave the prima facie provision the designation "§ 5(a)." For the sake of clarity, the enactment will be referred to herein as § 5(a).

9200 (1914). The Senate Judiciary Committee, although supportive of the House version, *see* 51 CONG. REC. 13853 (remarks of Senator Chilton) (1914), substituted a prima facie standard for the conclusive provision of the House bill. The reason for the change was the mistaken belief of some Senators that mutuality of parties was a constitutional requirement. In their view, it would have been a denial of due process to have allowed a conclusive effect in a non-mutuality situation. S. REP. No. 698, 63 Cong., 2d Sess. 45 (1914). *See Parklane Hosiery Co.* v. *Shore*, —— U.S. ——, 99 S. Ct. 645 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971) (non-mutuality collateral estoppel held not violative of due process). Preferring the conclusive presumption, but convinced that mutuality was constitutionally mandated, both houses of Congress adopted the prima facie version of the bill. 51 CONG. REC. 13907; 16276 (1914).

Most significantly, there is nothing in the legislative history which supports the notion, or even suggests, that the Congress which enacted § 5(a) ever intended to exclude the operation of the common law doctrine of collateral estoppel. Indeed, just the opposite is true. Congress clearly viewed § 5(a) as a supplement to the common law—*see Buckeye Powder Co.* v. *E. I. duPont de Nemours Powder Co.*, 248 U.S. 55 (1918)—and purposely did not intend to preempt collateral estoppel or to infringe upon any other common law rights or remedies of antitrust plaintiffs. *See* 51 CONG. REC. 16058 (remarks of Senator Overman); 51 CONG. REC. 15939 (dialogue between Senators Nelson and Overman) (1914).

Section 5(a), as it relates to private litigants, has remained unchanged to the present day. Since 1914 there have been proposals to amend § 5(a) to give prior Government judgments a conclusive effect in subsequent private actions.

H.R. 7647, 98th Cong., 2d Sess. (1978); S. 2512, 89th Cong., 2d Sess. (1966); H.R. 7905, 81st Cong., 2d Sess. (1950). However, none of these proposals ever progressed farther than the committee stage and none of them was acted upon by the full membership of either house of Congress. Section 5(a) was amended in 1955, but this legislation dealt only with the United States Government as a damage plaintiff. Act of July 7, 1955, Pub. L. 137, 69 Stat. 282-283. Private parties were not affected by the amendment and no material change was effected in the purpose of the statute. *City of Burbank* v. *General Electric Co.*, 329 F. 2d 825, 831 (9th Cir. 1964).

The Seventh Circuit rejected "the version of congressional intent pressed upon us by plaintiff" because the court believed that "the alleged intent of the 1914 Congress to allow collateral estoppel to work is not clear." Appendix A at A7. These statements reveal the Seventh Circuit's failure to come to grips with the central issue of this appeal. That issue is not whether § 5(a), by itself, authorizes a conclusive effect. *See* Appendix A at A8-A9. The 1914 legislative history clearly refutes this. Nor is it a question of whether the 1914 Congress was prescient enough to "have intended that the doctrine of collateral estoppel, if and when it evolved, should supplant the *prima facie* standard it was then enacting." Appendix A at A7. It would be too much to expect any legislative body to anticipate a common law development that lay 60 years in the future.

The central question at issue in this case, rather, is whether the common law doctrine of collateral estoppel should apply to subsequent private antitrust actions just as it does to all other federal civil litigation. Related to this question is whether the application of common law collateral estoppel would be inconsistent with some expressed policy of the

Congress. If there is no inconsistency, the statute should not be construed as altering common law rights or remedies further than its words express.[9] *Shaw* v. *North Penn. R. Co.*, 101 U.S. 557 (1880). *Cf. Moragne* v. *States Marine Line*, 398 U.S. 375 (1970); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964) (preserving common law remedies where not inconsistent with the statutory scheme).

It is beyond dispute that the members of the 1914 Congress intended that private plaintiffs be allowed to use prior Government judgments as extensively as constitutional limitations would permit. The conclusion that § 5(a) precludes the operation of collateral estoppel in those specific cases where it would otherwise apply defeats the expressed purpose of the 1914 Congress to ease the burden of private litigation. Permitting the operation of collateral estoppel, on the other hand, supplements and complements the statute, giving full force and effect to Congressional purposes and policies.

Similar reasoning was employed by this Court in construing the scope of § 5(b) of the Clayton Act in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965). The question before the Court was whether,

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9. Section 5(a) does not preempt common law evidentiary use of a prior conviction. *See Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 571 n. 8 (1951); *Simco Sales Service of Pa.* v. *Air Reduction Co.*, 213 F. Supp. 505, 508 (E.D. Pa. 1963). The existence of a statutory evidentiary presumption, e.g., § 5(a), does not necessarily preclude the application of the judicial doctrine of collateral estoppel. Collateral estoppel, a rule of the substantive law of judgments, exists independent of evidentiary rules, be they common law or statutory. *See e.g., Connecticut Fire Ins. Co.* v. *Ferrara*, 277 F. 2d 388, 392 (8th Cir. 1960); Advisory Committee's Note to FED. R. EVID. 803(22).

under § 5(b) (now § 5(i), 15 U.S.C. § 16), proceedings by the Federal Trade Commission suspended the running of the Clayton Act statute of limitations.

After determining that the legislative history was silent on the point, the Court stated:

> In resolving this question, we must necessarily rely on one element of Congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions.

381 U.S. at 320. And further, the Court reasoned:

> But it is not the literal wording of such a provision that is controlling where, as here, Congress has evidenced neither acceptance nor rejection of either interpretation, yet one effects a clearly expressed congressional purpose while the other defeats it.

381 U.S. at 321.

In addition to misreading the intent of the 1914 Congress, the Seventh Circuit relied upon the unsuccessful post-1914 attempts to amend § 5(a) and the 1955 amendment, in concluding that collateral estoppel was preempted. However, it is fundamental that legislation is to be interpreted in conformity with the dominant purpose of the Congress that enacted it. *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 542 (1940). The intent of the enacting Congress is controlling unless an amendment by a subsequent Congress modifies or rejects the original purpose of the legislation. *See Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 380-82 n. 11 (1969). This Court has repeatedly recognized that the views of a subsequent Congress as to existing legislation cannot change the original intent of the enacting Congress, *Tennessee Valley Authority* v. *Hill*, —— U.S. ——, 98 S. Ct. 2279, 2301 (1978); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720,

733-34 n. 14 (1977); *Rail Re-organization Act Cases*, 419 U.S. 102, 132 (1974); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968). "The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance." *United States* v. *Wise*, 370 U.S. at 411. Undoubtedly motivated by the realization that thousands of bills die in committee each year, the courts have refused to attribute meaning to the bare fact that a proposed amendment failed to be passed. *United States* v. *Turley*, 352 U.S. 407, 415 n. 14 (1957); *Citizens Comm. For Broadcasting* v. *F.C.C.*, 555 F. 2d 938, 952 n. 41 (D.C. Cir. 1977), *aff'd in part, rev'd in part on other grounds*, —— U.S. ——, 98 S. Ct. 2096 (1978).

The decision below failed to follow these principles in relying on post-passage developments. As the District Judge correctly recognized below, "it is not apparent . . . how inaction by Congress in the 1950's can shed light on what it did do in 1914." *Illinois* v. *Huckaba & Sons Construction Co.*, 442 F. Supp. 56, 58 (S.D. Ill. 1977), Appendix B at B5.

If allowed to stand, the Seventh Circuit's decision means that whenever later Congresses have failed to enact amendments to an existing statute, the statute must be construed as rejecting the result of those proposed amendments, without regard to the intent of the Congress that originally enacted the statute. In effect, the decision below dignifies *every* legislative proposal, regardless of its merits or the support it enjoys, as being indicative of Congressional purpose. Such a conclusion is clearly contrary to the decisions of this Court cited above.

The Seventh Circuit's reliance on the 1955 amendment is also misplaced for the amendment was not directed at private plaintiffs and there is no evidence that Congress even

considered the question of preempting the operation of collateral estoppel. *See* H. R. Rep. No. 422; S. Rep. No. 619, 84th Cong., 1st Sess., *reprinted* in U.S. Cong. Code & Admin. News 2328 (1955). In view of the fact that offensive collateral estoppel was not yet sanctioned by the courts in 1955, *see* Part II *supra*, it would have been impossible for Congress to have considered the question of preemption.

The ultimate effect of the decision below is that it converts a statute that was intended to benefit private plaintiffs into one which acts as a hindrance to the prosecution of private antitrust actions. The irony of this situation has not gone unnoticed:

> It seems odd that a statutory provision which was enacted to strengthen antitrust plaintiffs should now be interpreted to make them worse off in many cases than they would have been without the enactment.

Fleer Corp. v. *Topps Chewing Gum, Inc.*, 415 F. Supp. 176, 185 (E.D. Pa. 1976), *appeal dismissed*, (3rd Cir.), *cert. denied*, —— U.S. ——, 98 S. Ct. 1611 (1978).

This Court warned against such a construction when it indicated that a "literal application of a statute which would lead to absurd consequences is to be avoided when even a reasonable application can be given which is consistent with the legislative purpose." *United States* v. *Ryan*, 284 U.S. 167, 175 (1931).

In the circumstances presented by this case, the only reasonable application of § 5(a) that is consistent with the legislative purpose is to permit the common law doctrine of collateral estoppel to operate in private antitrust litigation just as it does in all other federal litigation. Accordingly, this Court should grant certiorari to review the decision of the court below to insure that the important Congressional policy fostering private antitrust enforcement is not frustrated.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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March, 1979

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-1479
STATE OF ILLINOIS, *Plaintiff-Appellee,*

v.

GENERAL PAVING COMPANY and F. F. MENGEL COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.
No. S-Civ-75-0096—**J. Waldo Ackerman,** *Judge.*

HEARD NOVEMBER 28, 1978—DECIDED JANUARY 11, 1979

Before FAIRCHILD, *Chief Judge, CUMMINGS, Circuit Judge,* and GRANT, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* In January 1974, appellants and Huckaba & Sons Construction Co.[1] were indicted under

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* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

1. Huckaba has not appealed from the adverse judgment below and is therefore bound by it. Arcole Midwest Corporation and Orr Construction Company are defendants in related treble damage actions and have filed briefs *amici curiae* as to the effect their guilty pleas might have in those private actions. We need not address that question directly since our decision effectively disposes of the issue.

Section 1 of the Sherman Act. Huckaba pled guilty and appellants were found guilty by a jury. In June 1975, the State of Illinois filed this action seeking treble damages from appellants and Huckaba under Section 4 of the Clayton Act (15 U.S.C. § 15). In its complaint, Illinois alleged the same antitrust violation as in the federal indictment, and the three defendants filed answers denying liability. Subsequently, relying solely on the federal criminal judgment, Illinois moved for partial summary judgment on the issues of liability against all three defendants.

On December 14, 1977, Judge Ackerman filed a memorandum opinion holding that the doctrine of collateral estoppel could properly be invoked by the State to preclude the defendants from asserting any defenses. The court rejected defendants' argument that collateral estoppel was unavailable to the State because Section 5(a) of the Clayton Act made the earlier final judgment only "*prima facie* evidence."[2] However, the court's order reserved summary

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2. Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)) provides:

> "A final judgment or decree heretofore or hereinafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie evidence against such defendant* in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15(a) of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgements or decrees entered before any testimony has been taken or to judgment or decrees entered in actions under Section 15(a) of this title." (Emphasis added.)

judgment on liability for 60 days so that the parties might have an opportunity to show the court whether the facts were the same in the Government and treble damage actions. *State of Illinois* v. *Huckaba & Sons Construction Co.*, 442 F. Supp. 56 (S.D. Ill. 1977). Thereafter, concluding that the actions were brought on the same facts, the district court granted the State's motion for partial summary judgment on the issue of liability even though defendant Mengel's president had earlier filed an affidavit denying his company's guilt. We granted appellants Mengel and General Paving leave to appeal from the two interlocutory orders and now reverse them.

On its face, Section 5(a) of the Clayton Act clearly provides that a prior judgment in favor of the Government in an antitrust case shall only have *prima facie* evidentiary effect in subsequent private suits. This results in shifting the burden of proof to defendants, but the statute does not preclude them from putting up a defense. We have so interpreted the statute in *Emich Motor Corp.* v. *General Motors Corp.*, 181 F. 2d 70, 76 (7th Cir. 1950), reversed on other grounds, 340 U.S. 558, and in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 325 F. 2d 412 (7th Cir. 1963), certiorari denied, 376 U.S. 939. The Supreme Court agreed with our construction of Section 5(a) in *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 690, where Justice Harlan observed that Section 5(a) of the Clayton Act "would seem to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation, even though relating to the same subject matter."[3]

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3. To the same effect, see *Purex Corp.* v. *Procter and Gamble Co.*, 453 F. 2d 288, 290 (9th Cir. 1971), certiorari

(Footnote continued on next page)

In holding that the Government's criminal judgment should be given a conclusive effect with respect to the treble damage liability of defendants, the district judge especially relied on *McCook* v *Standard Oil of California*, 393 F. Supp. 256 (C.D. Cal. 1975), and *Fleer Corp* v. *Topps Chewing Gum, Inc.*, 415 F. Supp. 176 (E.D. Pa. 1976). *McCook* does not so hold but instead concluded that the prior judgment against Standard Oil constituted only "a rebuttable presumption" (at p. 260). This holding was based on the conclusion that because in that case giving the prior judgment a conclusive effect would deprive the defendant of a jury trial, it would be unfair, if not unconstitutional to do so. The *McCook* court merely alluded to the possibility that Section 5(a) might also prevent application of the doctrine of collateral estoppel, noting that legislative history might suggest that Section 5(a) set only a minimum standard but that nonetheless "many cases have assumed that Section 5(a) fully occupies the area or have so ruled" (at p. 259).

Similarly, the *Fleer* case did not hold that collateral estoppel was applicable to judgments covered by Section 5(a) of the Clayton Act. In fact, the district judge noted that no court had held that the doctrine of collateral estoppel applied to such antitrust litigation, and he too pointed out that various courts have held that Section 5(a) preempted the use of collateral estoppel. The opinion be-

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(Footnote continued from preceding page)

denied, 405 U.S. 1065; *New Jersey Wood Finishing Co.* v. *Minnesota Mining & Mfg Co.*, 332 F. 2d 346, 358 (3d Cir. 1964), affirmed, 381 U.S. 311; *State of Michigan* v. *Morton Salt Co.*, 259 F. Supp. 35, 58-62, 64-65 (D. Minn. 1966), affirmed, 377 F. 2d 768 (8th Cir. 1967); *United States* v. *Grinnell Corp.*, 307 F. Supp. 1097 (S.D. N.Y. 1969); *Zuckerman* v. *E. I. DuPont de Nemours & Co.*, 1953 Trade Cases ¶67,468, p. 68,346 (S.D. N.Y. 1953).

low is the first to hold otherwise since Section 5(a) was enacted in 1914.

Judge Ackerman stated that only one of the cases relied upon by appellants as establishing that the *prima facie* language of Section 5(a) controls actually ruled on the question. He rejected that case, *Purex Corporation Ltd.* v. *Procter and Gamble Company*, 308 F. Supp. 584 (D.C. Cal. 1970), affirmed on other grounds, 453 F. 2d 288 (9th Cir. 1971), as "bottomed on an unsound foundation" (442 F. Supp at 59) and distinguishable because it involved the potential denial of the right to a jury trial. Since he found it "clear * * * that the intent of Congress in 1914 was * * * to give to a plaintiff what they thought they could and leave anything 'more' to the passage of time and the course of future events" (*id.*), he concluded that a collateral estoppel effect should be available to the plaintiff.

If it were truly clear that the 1914 Congress did intend the doctrine of collateral estoppel, when possible, to supplant Section 5(a), the plaintiff's insistence that such intent must prevail until revoked by subsequent statute might have some plausibility. *Tennessee Valley Authority* v. *Hill*, — U.S. —, 46 LW 4673. But even if the legislative history of the 1914 Act were as the plaintiff contends, the 1955 amendments to Section 5(a) rejected the position espoused by plaintiff.

In the 1955 amendments, Congress permitted the Government to recover civil damages in an antitrust action by enacting Section 4A of the Clayton Act (15 U.S.C. § 15a) and amending Section 5(a) to include the United States as an "actual damages" plaintiff. Congress simultaneously limited the use of an enforcement action judgment in later damage suits by the United States by making such a judg-

ment only *prima facie* evidence of antitrust violations.[4] By reenacting Section 5(a) incorporating these changes but refusing to enact a proposal that enforcement judgments should be given a conclusive effect, Congress clearly indicated that they should not be given such effect.[5]

In fact, Congress has repeatedly refused to adopt proposals that would change the *prima facie* standard of Section 5(a) to a conclusive one. Such proposals were rejected

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4. The Supreme Court had previously held in *Local 167* v. *United States*, 291 U.S. 293, 298, that in a government civil action for an injunction against violations of Sections 1 and 2 of the Sherman Act, the judgment in a prior criminal antitrust prosecution against the civil defendants "conclusively established in favor of the United States against those who were found guilty that within the period covered by the indictment the latter were parties to the conspiracy charged." Hence the limitations written into Section 5(a) in 1955 preempted what had been established by *Local 167* to be the Government's common law right of estoppel. *United States* v. *Grinnel Corp.*, 307 F. Supp. 1097 (S.D. N.Y. 1969). This is a further demonstration that Section 5(a) was intended to preempt the common law rule of collateral estoppel.

5. The proposal to give enforcement judgments conclusive effect was presented in 1950 and finally rejected when the amendments to Section 5(a) were enacted in 1955. The history of the 1950 consideration of the conclusive effect proposal shows that the major objections to it were based on the feeling that it would be too harsh on defendants, not on concern for its possible unconstitutionality. Hearings on H.R. 7905 (H.R. 8763) before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, 81st Cong., 2d Sess. ser. 14, pt. 5 (1950); Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 Yale L.J. 541, 550-551 (1976).

in 1914, 1950, 1955 and again in 1966 (see Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 Yale L.J. 541 (1976), and a similar proposal[6] was not approved by the present Congress.

Moreover, the alleged intent of the 1914 Congress to allow collateral estoppel to work is not clear. The remarks of a few Senators from the floor surely do not prove that Congress intended that the doctrine of collateral estoppel, if and when it evolved, should supplant the *prima facie* standard it was then enacting. If it really intended such a development, Congress could easily have provided that enforcement judgments would have *at least* a *prima facie* effect or could have adopted a similar provision. Since it did not do so, and since subsequent Congresses have not only refused to amend the statute to adopt a conclusive standard after the constitutional concerns evaporated, but instead have actually amended it to extend the *prima facie* standard, we cannot embrace the version of congressional intent pressed upon us by the plaintiff.[7]

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6. H.R. 7647, 95th Cong., 2d Sess. (1978).

7. Plaintiff and Judge Ackerman cited two law review articles which offer policy-based arguments that prior enforcement judgments should be given collateral effect in subsequent private damage actions. McWilliams, *Federal Antitrust Decrees: Should They Be Given Conclusive Effect in a Subsequent Private Action?*, 48 Miss. L.J. 1 (1977); Note, *The Use of Government Judgments in Private Anti-Trust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. Chi. L. Rev. 338 (1976). However, both of those articles embrace an erroneous view of the 1914 legislative history and deal only summarily or not at all with the subsequent amendments to Section 5(a).

Finally, the repeated judicial holdings even after the evolution of the doctrine of collateral estoppel that Section 5(a) allows only *prima facie* effect must be given due weight. In light of this background, both the case law and the repeated refusals of Congress to enact the suggested provision providing for a conclusive effect indicate that Section 5(a) is to be read as precluding such an effect.[8] If the *prima facie* evidence standard of Section 5(a) is to be changed, it is for Congress to do so. See *United States* v. *Cooper Corp.*, 312 U.S. 600, 605-606.

Illinois also relies on the use of the word "estoppel" in Section 5(a). See note 2 *supra*. However, estoppel as used there only determines what matters have been established *prima facie* by the government judgment. In discussing this aspect of Section 5(a), the Supreme Court has held that it only entitles a civil plaintiff "to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." *Emich Motor Corp.* v.

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8. Another recent law review article, after a careful analysis of the amendments to Section 5(a), has concluded that it precludes the result sought by plaintiff. Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 Yale L.J. 541 (1976). Moreover, earlier law review articles assumed that even though there was no constitutional impediment to giving enforcement judgments conclusive effect, this could not be done without congressional authorization. Note, *Government Antitrust Judgments as Evidence in Private Actions*, 65 Harv. L. Rev. 1400, 1407 (1952); Note, *Clayton Act Section 5: Aid to Treble Damage Suitors*, 61 Yale L.J. 417, 425 (1952).

General Motors Corp., 340 U.S. 558, 569.[9] Because of this statutory estoppel language appellants do not dispute the matters for which the prior government criminal judgment may be given *prima facie* evidentiary effect. They only assert that such matters may not be given conclusive effect, and for the foregoing reasons we agree.

The orders appealed from are reversed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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9. See also *Harrison* v. *Paramount Pictures, Inc.* 115 F. Supp. 312 (E.D. Pa. 1953), affirmed, 211 F. 2d 405 (3d Cir. 1954); *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F. 2d 709 (9th Cir. 1959); *Eagle Lion* v. *Loew's Inc.*, 245 F. 2d 438 (7th Cir. 1957), affirmed *per curiam*, 358 U.S. 100; *State of Michigan* v. *Morton Salt Co.*, 259 F. Supp. 35, 64-65 (D. Minn. 1966); *Ida Amusement Corp.* v. *RKO Pictures Corp.*, 1954 Trade Cases ¶ 67,837 at p. 69,709 (S.D. N.Y. 1954).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS—
SOUTHERN DIVISION

STATE OF ILLINOIS, *Plaintiff,* v. HUCKABA & SONS CONSTRUCTION COMPANY, GENERAL PAVING COMPANY, AND F. F. MENGEL COMPANY, *Defendants.*	S-Civ-75-0096

MEMORANDUM ORDER

The State of Illinois seeks a partial summary judgment on the issue of liability pursuant to F.R. Civ. P. 56(a). It asserts that the defendants are the same defendants against whom a judgment of conviction was rendered in a prior criminal antitrust action brought by the United States. *United States of America* v. *Huckaba & Sons Construction Co., et al.,* S-Cr-74-3 (S.D. Ill. 1974). It asserts further that the conviction was had on the same facts as those presently pleaded in its complaint. For the purposes of this memorandum order, such assertions will be taken as true.

The motion is premised on the doctrine of collateral estoppel, in effect saying that defendants can assert no defense —being estopped from doing so by the doctrine. Again, for the purposes of this order, I will assume that the doctrine has that effect. Thus the focus is sharpened to the pivotal question: Can the doctrine here be invoked by plaintiff?

Since plaintiff's action is statutory, I look first to the statute—Section 5(a) of the Clayton Act. 15 U.S.C. § 16(a):

> A final judgment or decree heretofore or hereinafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie evidence against such defendant* in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15(a) of this Title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgment or decrees entered in actions under Section 15(a) of this Title. (Emphasis added.)

I have emphasized the prima facie aspect of the conviction or judgment for the reason that defendants view this as a delimitation while the State views it as a jumping off place. Let me make my meaning more precise. That a prior judgment is prima facie evidence simply means that a plaintiff can shift the burden of proof to the defendant—but it does not preclude a defendant from putting up a defense. Plaintiff's case is then made with the judgment but defendant still has his day. Accordingly, defendants argue that since they have a right to defend—albeit that the burden is on them—the motion should be denied. Another way of putting this is that saying that a judgment is prima facie evidence is not the same thing as saying that it is conclusive. If we stop here, defendants are right, and the motion should be denied.

However, plaintiff argues that not only is the prior conviction prima facie evidence, but something a great deal more—in effect, conclusive, based on the doctrine of collateral estoppel. This doctrine is not enunciated in the statute—so the question is, is the doctrine otherwise available.[1] A recourse to policy and legislative history may aid in the search for intent.

That Congress intended to ease the burden for plaintiffs is clear.[2] There was also a sly intent—sly in the best sense of the word—to encourage consent decrees as witnessed by the congressional abjuration that a consent decree was *not* to be prima facie evidence.[3] But these intentions so easily garnered are not of much help in answering our question—hence we turn to legislative history for whatever clues it may give us.

It turns out that way back in 1914 the House version did make a prior judgment conclusive evidence in a subsequent action.[4] But the Senate demurred even though they thought there were "considerations of public policy which favor the House provision of conclusiveness".[5] What the Senate

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1. This issue has not only been ably briefed by the parties and amici curiae but has been the subject of discussion by a number of commentators. See generally, McWilliams, Federal Antitrust Decrees: Should They Be Given Conclusive Effect in a Subsequent Private Action? 48 Miss. L.J. 1 (1977), and Comment, 43 U. Chi. L. Rev. 338 (1976), both of which argue that the application of collateral estoppel is not precluded by Section 5(a) and Comment, 85 Yale L.J. 541 (1976) which arrives at the opposite conclusion.

2. See, 51 Cong. Rec. 1964 (1914), remarks of President Wilson; *Emich Motor Company* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951); and *State of Michigan* v. *Morton Salt Co.*, 259 F. Supp. 35 (D.C. Minn. 1966).

3. See also, *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 371 (D.C. Minn. 1939) and *State of Michigan* v. *Morton Salt Co., supra,* n. 2 at 59.

4. 51 Cong. Rec. 9200 (1914).

5. S. Rep. No. 698, 63rd Cong. 2d Sess. 45 (1914).

feared was the then extant notion that due process was antithetical to conclusiveness and that its inclusion would work a constitutional infirmity. Therefore the Senate version was accepted and became law, for the House, too, was fearful that conclusiveness might taint their version,[6] so prior judgments were characterized as prima facie evidence.

The fears of Congress went unrequited. It so evolved that conclusiveness, that is, collateral estoppel, was not violative of due process. The notion had prevailed that for an estoppel to be created, the parties in the second action had to be the same as in the first, but as has been said, that law did not so evolve.[7]

Thus, plaintiff argues that the inclusion of the prima facie standard—because Congress was then being wholesomely trepidatious—does not preclude the use of subsequent developments in the common law even though Congress rejected language which would have achieved a similar result because of what turned out later to be groundless fears. In other words, what Congress meant, according to plaintiff, was that plaintiff at a bare minimum could use the prior conviction as prima facie evidence and any other rules of the common law as might be available from time to time.[8]

Of course, defendants argue the converse, stating that the use of the words "prima facie" by implication preclude

6. 51 CONG. REC. 16275 (1914).

7. Compare, *Buckeye Powder Co.* v. *E. I. duPont de Nemours Powder Co.*, 248 U.S. 55, 63 (1918) with *Bernhard* v. *Bank of America Nat'l. Trust & Savings Ass'n.*, 122 P. 2d 892 (1942) and *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971).

8. See, *McCook* v. *Standard Oil of California*, 393 F. Supp. 256, 259 (C.D. Calif. 1975).

the prior judgment from being conclusive—else why use the word. They also buttress their arguments by attempts in the 1950's to amend the section so that a prior judgment for the government against X would be as conclusive as against X when used by another party.[9] Notwithstanding, the prima facie standard remained intact. From these rebuffs, defendants argue that the intent of Congress shines through, that is, that conclusiveness in 1914 was precluded. But it is not apparent to me how inaction by Congress in the 1950's can shed light on what it did do in 1914. I would not say that rebuffs in a given context might not shed light —only that they do not do so here.

One would suppose that between 1914 and to date, we would have an authoritative pronouncement—but such is not the case. Of the many cases cited to me by both sides, most merely seek to define the scope of the estoppel[10] while others are distinguishable on other grounds[11] and only a few need to be examined with any particularity. *Purex Corporation Ltd.* v. *Proctor and Gamble Company*, 308 F. Supp.

9. See, H.R. 7905 81st Cong. 2d Sess. (1950). A similar attempt was made in 1966, but also failed. See, S. 2512, 89th Cong. 2d Sess. (1966).

10. See, *Emich Motors Corp.* v. *General Motors Corp.*, 181 F. 2d 70 (7th Cir. 1950) reversed on other grounds, 340 U.S. 558 (1951); *Deluxe Theatre Corp.* v. *Balaban & Katz*, 95 F. Supp. 983 (N.D. Ill. 1951); *New Jersey Wood Finishing Co.* v. *Minnesota Mining and Manufacturing Co.*, 332 F. 2d 346 (3rd Cir. 1964) *aff'd* 381 U.S. 311 (1965); *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F. 2d 709 (9th Cir. 1959), *cert. den.*, 361 U.S. 961 (1960); *Harrison* v. *Paramount Pictures*, 115 F. Supp. 312 (E.D. Pa 1953) *aff'd* 211 F. 2d 405 (3rd Cir. 1954).

11. See, *e.g.*, *United States* v. *Grinnell Corp.*, 307 F. Supp. 1097 (S.D.N.Y. 1969).

584 (D.C. Calif. 1970), *aff'd on other grounds* 453 F. 2d 288 (9th Cir. 1971), appears to be one. There Purex sought to use a Federal Trade Commission ruling to collaterally estop defendant Proctor and Gamble from litigating the issue of liability in a treble damage action. The court held that while the FTC order was a final judgment within the meaning of the section, the doctrine of collateral estoppel could not be utilized. [12] The court there apparently relied heavily upon *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951)[13]. In *Emich* the Supreme Court was presented with the scope of the prima facie standard.[14] It did not concern itself with the question before me but referred only to the "general doctrine of estoppel" to determine the scope of the section.[15] I need not belabor the point that the concept of the prima facie standard involves elements of estoppel—by definition. My reading of *Emich* leads me to the conclusion that their concern with the meaning of prima facie does not mean that a party cannot look beyond their definition to other remedies. Thus it seems to

12. *Purex, supra,* at 589-90.

13. *Purex, supra,* at 589.

14. The *Emich* Court at 566 defined the issues addressed in that opinion as follows:

> The issue we must determine as defined in our order granting review, is "whether the Court of Appeals erred in construing § 5 [now § 5(a)] of the Clayton Act . . . as not permitting: (a) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (b) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation."

15. 340 U.S. 558 at 568.

me the *Purex* opinion is bottomed on an unsound foundation. I also might note in passing that in the *Purex* case, the plaintiff sought to invoke for the purpose of collateral estoppel, a prior proceeding where there had been no right to a jury trial. Such a prior proceeding in my opinion could never be more than prima facie evidence in a subsequent proceeding and for that reason alone.[16]

Two cases do support the proposition that the doctrine of collateral estoppel is available. These cases are *McCook* v. *Standard Oil of California,* 393 F. Supp. 256 (C.D. Calif. 1975) and *Fleer Corp.* v. *Topps Chewing Gum, Inc.,* 415 F. Supp. 176 (E.D. Pa. 1976). While not germane to the issues or holding in *McCook,* the court did observe that legislative history seemed:

> . . . to suggest that Congress only intended to set a minimum standard for the effect of prior government antitrust judgments, thereby leaving the courts free to apply in accord with constitutional limitations any common law doctrines which would increase the effect of the prior judgment beyond the prima facie evidence standard. *McCook, supra,* at 259.

In *Fleer,* the defendant sought to collaterally estop the plaintiff in pleading a favorable FTC ruling in defendant's favor. While the motion was denied for other reasons, the court did state:

> [i]t seems odd that a statutory provision which was enacted to strengthen antitrust plaintiffs should now be interpreted to make them worse off in many cases than they would have been without the enactment. *Fleer, supra,* at 185.

In effect, these cases suggest that Congress intended in Section 5(a) to provide what it thought it constitutionally could,

16. See, *Rachel* v. *Hill,* 435 F. 2d 59 (5th Cir. 1970).

leaving the field open should time and the course of an enlarging jurisprudence bring about other concepts.

I therefore conclude that plaintiff is right, that defendants are estopped from pleading any defense and that the motion for summary judgment should be allowed. It seems clear to me that the intent of Congress in 1914 was, so to speak, to play it safe, to give to a plaintiff what they thought they could and leave anything "more" to the passage of time and the course of future events. In my opinion, this "more" is now available to plaintiff in the invocation of the doctrine of collateral estoppel which no longer carries any possibility of constitutional infirmity.

This is not to say that with this rendition, that willy-nilly, I must allow the motion. While for the purposes of this order I have assumed that the facts are the same in this case as in the prior criminal action—the allowance of this assumption must be tested. If the facts or some of them are not the same, obviously, defendants are entitled to have them tried. Accordingly, ruling is reserved pending the submission of additional briefs—plaintiffs shall have thirty days, defendants fifteen days to answer and plaintiff fifteen days to reply. I realize that this opinion, involving as it does a controlling question of law, will engender a substantial ground for differences of opinion and accordingly this order is certified under the provisions of 28 U.S.C. § 1292(b) for immediate appeal as such, in my opinion, will materially advance the ultimate termination of this litigation.

In summary, therefore: It is my opinion that

(1) 15 U.S.C. § 16(a) does not preclude the application of the doctrine of collateral estoppel;

(2) Plaintiff's motion for partial summary judgment is reserved pending the submission of additional briefs; and

(3) Certificate of importance allowing immediate interlocutory appeal is granted.

Enter this 14th day of December, 1977.

J. WALDO ACKERMAN,
United States District Judge.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS—
SOUTHERN DIVISION

STATE OF ILLINOIS, *Plaintiff,* v. HUCKABA & SONS CONSTRUCTION COMPANY, GENERAL PAVING COMPANY, and F. F. MENGEL COMPANY, *Defendants.*	S-Civ-75-0096

PARTIAL JUDGMENT ON PLAINTIFF'S CLAIM OF A VIOLATION OF SECTION 1 OF THE SHERMAN ACT

On May 4, 1977, plaintiff the State of Illinois, filed a motion for partial summary judgment on the issue of liability, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, against all defendants upon grounds of collateral estoppel seeking to establish as conculsive those ultimate facts which were necessarily decided adversely to the defendants in the prior action entitled *United States of America* v. *Huckaba & Sons Construction Company, et al.,* S-Cr-74-3 (S.D. Ill.) The threshold question concerning the availability of the doctrine of collateral estoppel was decided in plaintiff's favor in a Memorandum Order entered December 14, 1977. *State of Illinois* v. *Huckaba & Sons Construction Co.,* —— F. Supp. —— (S.D. Ill. 1977). That order withheld partial summary judgment pending briefing on the

issues of fact established in the prior criminal action. The question reserved there is before me now.

Having considered briefs, papers and the arguments of counsel for the parties as well as the briefs of *amici curiae,* and being fully advised in the premises:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's motion for partial summary judgment on the issue of liability is granted;

2. That beginning sometime in or about March, 1972, and continuing thereafter the defendants Huckaba & Sons Construction Company, General Paving Company, and F. F. Mengel Company entered into and engaged in a combination and conspiracy to suppress and eliminate competition in the construction of a specific portion of a federally assisted highway in the State of Illinois in unreasonable restraint of interstate commerce in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1).

3. That the conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to allocate to Huckaba & Sons Construction Company a specific project let by the State of Illinois on March 16, 1972, in connection with the construction of a federally assisted highway identified as Contract 27359, item 3; and to submit collusive, non-competitive and rigged bids to the State of Illinois in connection with the construction of the above referenced federally assisted highway project;

4. That for the purpose of forming and effectuating the conspiracy, the defendants and co-conspirators discussed the submission of prospective bids on the specific project let by the State of Illinois on March 16, 1972, identified

as Contract 27359, item 3; designated the successful low bidder in the above referenced federally assisted highway project; and submitted intentionally high or complimentary bids on the above referenced highway project;

5. That the aforementioned combination and conspiracy unreasonably restrained interstate trade and commerce;

6. That the aforesaid combination and conspiracy was entered into and carried out in part within the Southern District of Illinois.

Enter this 16th day of February, 1978.

/s/ J. WALDO ACKERMAN,
United States District Judge.

Supreme Court, U. S.
FILED
JUN 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1464

STATE OF ILLINOIS,

Petitioner,

vs.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

BRIEF OF RESPONDENT GENERAL PAVING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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It is asserted by Petitioner, as reasons for granting the Writ, that the decision below:

I. RAISES IMPORTANT AND RECURRING QUESTIONS CONCERNING THE ADMINISTRATION OF THE ANTITRUST LAWS AND THE EFFICACY OF THE TREBLE DAMAGE ACTION.

II. CONFLICTS, IN PRINCIPLE, WITH THE RECENT DECISION OF THIS COURT IN *PARK-LANE HOSIERY CO. V. SHORE.*

III. FRUSTRATES THE INTENT OF CONGRESS TO FOSTER THE USE OF PRIOR GOVERNMENT ANTITRUST JUDGMENTS AND IS BASED UPON AN ERRONEOUS APPLICATION OF PRINCIPLES OF STATUTORY CONSTRUCTION.

I.

The policy of encouraging vigorous private enforcement of the antitrust laws is not disrupted by the decision below. Petitioner's argument here is that the exercise of the constitutional right to trial by jury impedes law enforcement. If there is soundness in that argument sufficient for this Court to take cognizance of this matter on certiorari, then our entire system faces revamping.

Moreover, the argument that private litigation is "one of the surest weapons for effective enforcement of the antitrust laws" is self defeating in the case at bar, as it would be in virtually any case where Section 5(a) is invoked, for the predicate for operation of the prima facie rule is a prior judgment in a proceeding brought by or on behalf of the United States that a defendant has violated the antitrust laws. Thus, at that stage, the enforcement is a *feat accompli*. Understandably, none of the cases cited in support of this proposition involve the interpretation of Section 5(a).

The Petitioner then argues that this Court last considered the operation of 5(a) in the Clayton Act 28 years ago, in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951), and thus there is an absence of an authoritative Supreme Court pronouncement on the application of collateral estoppel in private antitrust actions and therefore the issue is novel.

In the face of the pronouncement by the Supreme Court in *Emich*, and the fact that the operable language of 5(a) has not been changed by Congress (although the antitrust laws have undergone revision a number of times by post-*Emich* Congresses) the novelty lies not in the issue, but in the *presentment* of the issue.

II.

The decision below does not conflict with *Parklane Hosiery Co. v. Shore*, 99 S.Ct. 645, 58 L.Ed. 552. First of all, in *Parklane*, there was no statutory procedural provision in the Securities Act, as in the Clayton Act.

But, apart from that proposition, *Parklane*, after negating mutuality of the parties as a requisite, clearly states that a trial judge should not allow the use of offensive collateral estoppel where (1) the plaintiff could easily have joined in the earlier action, or (2) where the application of offensive collateral estoppel would be unfair to the defendant. (Underscoring added.)

Consideration of the second element appears at paragraph (8)(a) of the opinion (pp. 561-562, 58 L.Ed. 2d.), where the Court said:

> "Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result . . ."

and in footnote (15), the inability of the defendant to engage in full-scale discovery is cited as such a procedural disadvantage.

In the criminal forum, a defendant certainly cannot engage in full-scale discovery as he could in a later civil case. The footnote to *Parklane* goes on to say:

> "Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost. The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action."

Incidentally, Justice Rehnquist's dissent in *Parklane* did not recognize that there was little reason why the Court's decision should not extend to private antitrust cases. Rather, he posed the possibility as a forewarning that the decision *may* extend to other areas in deprivation of defendant's right to jury trial.

III.

The intent of Congress is not frustrated. Whether the Court considers Section 5(a) as it was enacted by the 1914 Congress, or as it exists today, the result is the same. The contention that the 1914 Congress intended one thing (the conclusive presumption) but adopted another (prima facie rule) is a mistaken notion. The *adoption* of the prima facie rule clearly evidenced the intent of Congress. Its motive for adopting it is immaterial.

Likewise mistaken is the notion that Congress never intended to exclude the operation of the common law doctrine of collateral estoppel in antitrust cases. The argument that the original Section 5(a), as it relates to private litigants, has remained unchanged to the present day in spite of proposals to amend to give prior government judgments a conclusive effect in subsequent private actions certainly does not support the State's position in this respect. Indeed, it negates that position.

Nor is there any merit in the proposition that the decision below converts a statute that was intended to benefit private plaintiffs into one which acts as a hindrance to the prosecution of private antitrust actions (Pltf's Pet. p. 21). It is fictious to argue that the *prima facie* rule would deter a legitimate private claimant from prosecuting an antitrust suit, whereas, the same claimant would proceed if the rule were conclusive. Private antitrust plaintiffs already have many advantages over other plaintiffs at common law.

Congress, by its enactment of Section 5(a) as part and parcel of the antitrust laws, has simply pre-empted the area with respect to the effect to be given a prior judgment in a collateral action.

CONCLUSION

Under or apart from the general considerations outlined by Rule 19 of the Supreme Court Rules, the Petition contains no basis or reason for granting the Writ.

Respectfully submitted,

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By: Heckenkamp and Simhauser, P.C.
Its Attorneys

MOTION FILED
APR 21 1979

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1464

STATE OF ILLINOIS,

Petitioner,

v.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

MOTION OF PLAINTIFFS' CERTIFIED CLASS REPRESENTATIVES IN:

FOLDING CARTON ANTITRUST LITIGATION, MDL 250 (N. D. ILL.)

CORRUGATED CONTAINER ANTITRUST LITIGATION, MDL 310 (S. D. TEX.)

HEDGES ENTERPRISES, INC. v. CONTINENTAL GROUP, INC., ET AL., CIVIL NO. 78-1254 (E. D. PA.)

FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI, AND BRIEF AMICI CURIAE.

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TABLE OF CONTENTS.

Page

Motion of Certified Class Representatives to File a Brief *Amici Curiae* in Support of the Petition for Certiorari .. 1

Brief of Certified Class Representatives as *Amici Curiae* in Support of the Petition for Certiorari 7

A. The Interests Asserted by the *Amici* 8

B. Argument 9

1. The Seventh Circuit Did Not Address the Central Issue Presented of Whether a Federal Statute Has Actually Preempted the Federal Common Law 10

2. Statutory Preemption Creates a Discriminatory, Irrational and Arbitrary Impact on Courts and Litigants 12

3. The Seventh Circuit Erred in Deciding Congress Intended to Preempt Federal Common Law ... 15

4. The Seventh Circuit Misconstrued the Proper Role of the Federal Judiciary 16

C. Conclusion 17

TABLE OF CITATIONS.

Cases: Page

Aronson v. Quick Point Pencil Co., 47 U. S. L. W. 4219 (U. S., Feb. 28, 1979) 11

Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U. S. 313 (1971) 4

Corrugated Containers Antitrust Litigation, MDL No. 310 (S. D. Tex.), 80 F. R. D. 244 (S. D. Tex. 1978) .....1, et seq.

Folding Carton Antitrust Litigation, MDL No. 250 (N. D. Ill.), 75 F. R. D. 727 (N. D. Ill. 1977) .....1, et seq.

Hedges Enterprises, Inc. v. Continental Group, Inc., Civil No. 78-1254 (E. D. Pa.), 1979-1 CCH Trade Cases ¶ — (E. D. Pa. Feb. 6, 1979) .....1, et seq.

Illinois v. City of Milwaukee, 406 U. S. 91 (1972) 3, 9, 10, 11, 15, 16

Lawlor v. National Screen Service Corp., 349 U. S. 322 (1955) 13

Nashville Milk Co. v. Carnation Co., 355 U. S. 373 (1958) .3, 12, 13

Parklane Hosiery v. Shore, 99 S. Ct. 645 (1979) ...4, 9, 10, 11, 13, 14

State of Illinois v. General Paving Company and F. F. Mengel Company, No. 78-1479 (7th Cir. Jan. 9, 1979) 2, 3, 5, 9, 10, 14, 16

United States v. Continental Group, Inc., 456 F. Supp. 704 (E. D. Pa. 1978) 8

United States v. Consolidated Packaging Corporation, 575 F. 2d 117 (7th Cir. 1978) 8

TABLE OF CITATIONS (Continued).

Statutes: Page

Clayton Act:

Generally 12, 13

15 U. S. C. § 12 ..... 3, 4

15 U. S. C. § 15 8

15 U. S. C. § 16(a) 2, 3, 4, 5, 10, 12, 13, 14, 15

Federal Trade Commission Act, 15 U. S. C. § 45 13

Sherman Act:

Generally 12, 13

Section 1 ..... 8, 14

Wilson Tariff Act of 1914:

Generally 12, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1464.

STATE OF ILLINOIS,

Petitioner,

v.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

MOTION OF PLAINTIFFS' CERTIFIED CLASS REPRESENTATIVES IN:

FOLDING CARTON ANTITRUST LITIGATION, MDL 250 (N. D. ILL.)

CORRUGATED CONTAINER ANTITRUST LITIGATION, MDL 310 (S. D. TEX.)

HEDGES ENTERPRISES, INC. v. CONTINENTAL GROUP, INC., ET AL., CIVIL NO. 78-1254 (E. D. PA.)

FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI.

The undersigned class representatives, on behalf of the certified classes of plaintiffs in:

Folding Carton Antitrust Litigation, MDL 250 (N. D. Ill.);

Corrugated Container Antitrust Litigation, MDL 310 (S. D. Tex.);

Hedges Enterprises, Inc. v. Continental Group, Inc., et al., Civil No. 78-1254 (E. D. Pa.)

respectfully move, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, for leave to file a brief as *amici curiae* in support of the Petition for Certiorari filed by Petitioner, the Illinois Attorney General, herein. The Illinois Attorney General, Petitioner, and General Paving Company, Respondent, have consented to the filing of the brief of *amici curiae*. Respondent F. F. Mengel Company has not consented.

In support of this Motion, *amici curiae* state:

1. The United States Court of Appeals for the Seventh Circuit has ruled on an extremely important federal question in *State of Illinois v. General Paving Company and F. F. Mengel Company*, No. 78-1479 (7th Cir. Jan. 9, 1979) [hereinafter *Illinois v. General Paving*]. The Seventh Circuit decided that the statutory provision of 15 U. S. C. § 16(a) providing for prima facie use of certain prior judgments preempts the federal common law remedy of collateral estoppel use of prior judgments.

2. The decision in *Illinois v. General Paving* should be reviewed by the Court for two fundamental reasons not addressed in the Petition for Certiorari and which are addressed in the attached brief of *amici curiae*. *Amici curiae* respectfully suggest that by granting them leave to file the attached brief, the Court will be assisted significantly in passing upon the following issues:

A. Whether the Seventh Circuit's decision in *Illinois v. General Paving* is in direct conflict with this Court's decision in *Illinois v. City of Milwaukee*, 406 U. S. 91, 104-107 (1972), which established the rule for determining when a federal statute has preempted the federal common law. The Seventh Circuit acknowledged that the issue before it was statutory preemption of the federal common law, *see Illinois v. General Paving*, Appendix A to the Petition at A-6, n. 4. However, the Seventh Circuit did not discuss any principle for deciding when preemption should be deemed to have occurred. It did not cite *Illinois v. City of Milwaukee, supra*, or indeed any other legal authority, on this central issue. Under the standards articulated by the Court in *Illinois v. City of Milwaukee, supra*, and other decisions, preemption of the federal common law by the statute clearly has *not* occurred, because there is no inconsistency or conflict in applying the statute and the federal common law of collateral estoppel. The above argument is set forth more fully in the attached brief of *amici curiae*.

B. Second, whether the effect of the decision by the Seventh Circuit in *Illinois v. General Paving* is to create an irrational scheme of selective, piecemeal preemption. *Amici curiae* respectfully suggest that the Seventh Circuit's opinion did not adequately consider the consequences of its holding that statutory preemption had occurred. The statute at issue, 15 U. S. C. § 16(a), by its terms can only apply to prior judgments prosecuted by the United States Government under the specific "antitrust laws", as defined in 15 U. S. C. § 12, which judgments are then sought to be used by other parties in subsequent proceedings also pursuant to the same "antitrust laws." See *Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, 375 (1958) for definition of the specific "antitrust laws." According to the Seventh Circuit, in the above situation collateral estoppel may *never* be invoked. But in all circumstances not governed by 15 U. S. C. § 16(a), the federal common law must necessarily apply. As examples, 15 U. S. C. § 16(a) permits collateral estoppel to be applied on a discretionary basis to a judgment prosecuted by the United States Government under any *statute* other than the "antitrust laws," which is then invoked by a party in a subse-

quent proceeding under the "antitrust laws." The statute also permits collateral estoppel to be applied to a judgment prosecuted by a *party* other than the United States Government (even if prosecuted under the "antitrust laws"), and sought to be used by another party in a subsequent proceeding under the "antitrust laws." Categorically excluding collateral estoppel in the one situation above when the statute applies, but permitting it on a discretionary basis in the other two when the statute does not apply, is irrational. It furthers no policy of either Congress or the federal judiciary. It actively frustrates the intent of Congress as expressed in the legislative history of 15 U. S. C. § 16(a). It also actively frustrates the judicial policy articulated in *Parklane Hosiery v. Shore*, 99 S. Ct. 645 (Jan. 9, 1979) and *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U. S. 313 (1971) that needless relitigation should be avoided, and that collateral estoppel should be applied whenever it is inherently fair to the party sought to be estopped to do so. Under the Seventh Circuit's decision, this consideration of inherent fairness can not be considered for a certain class of judgments, and the wholly extraneous and irrelevant factors of *who* prosecuted the prior judgment (whether the United States or not) and under what *laws* those judgments were obtained (whether under the "antitrust laws" of 15 U. S. C. § 12 or not) determine whether collateral estoppel may be invoked. The above argument is set forth more fully in the attached brief by *amici curiae*.

3. The decision by the Seventh Circuit in *Illinois v. General Paving* also deserves review by the Court because it is in conflict with the statutory language and history of 15 U. S. C. § 16(a), and amendments thereto, which evidence a Congressional desire to *benefit* private antitrust plaintiffs, and not, as is the effect of the Seventh Circuit's

decision, to place a discriminatory burden on those plaintiffs not shared by any other category of litigants in the federal courts: the *per se* inability to use a prior Government judgment for collateral estoppel purposes.

Interest of the Amici.

Amici curiae, as private businesses, are among the intended beneficiaries of the private treble damage remedy of the antitrust laws, and as such are greatly prejudiced by the decision in *Illinois v. General Paving*. In each action in which the class representatives are parties plaintiff, at least one party defendant has either been criminally convicted of violating Section 1 of the Sherman Act in an indictment charging the existence of a horizontal price-fixing conspiracy or is presently standing trial on an indictment charging such a conspiracy, which may lead to a criminal judgment of conviction. The Seventh Circuit's *Illinois v. General Paving* decision holds that such final judgments of conviction are excluded from collateral estoppel treatment. This holding controls in the *Folding Carton Antitrust Litigation*, MDL 250 (N. D. Ill.), and carries persuasive effect as the only appellate ruling on this issue in *Corrugated Container Antitrust Litigation* MDL 310 and *Hedges Enterprises, Inc. v. Continental Group Inc.*, Civil No. 78-1254 (E. D. Pa.).

Wherefore, movants respectfully request that the Court grant them leave to file the attached brief in Support of the Petition for Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1464.

STATE OF ILLINOIS,

Petitioner,

v.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

BRIEF OF PLAINTIFFS' CERTIFIED CLASS REPRESENTATIVES IN:

FOLDING CARTON ANTITRUST LITIGATION, MDL 250 (N. D. ILL.)

CORRUGATED CONTAINER ANTITRUST LITIGATION, MDL 310 (S. D. TEX.)

HEDGES ENTERPRISES, INC. v. CONTINENTAL GROUP, INC., ET AL., CIVIL NO. 78-1254 (E. D. PA.)

AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI.

A. THE INTERESTS ASSERTED BY AMICI CURIAE.

Amici curiae are class representatives on behalf of the certified classes of private, non-governmental plaintiffs in the *Folding Carton Antitrust Litigation*, MDL No. 250 (N. D. Ill.), *see* 75 F. R. D. 727 (N. D. Ill. 1977), the *Corrugated Container Antitrust Litigation*, MDL No. 310 (S. D. Tex.), *see* 80 F. R. D. 244 (S. D. Tex. 1978), and *Hedges Enterprises, Inc. v. Continental Group, Inc.*, Civil No. 78-1254 (E. D. Pa.), *see* 1979-1 CCH Trade Cases ¶ — (E. D. Pa. Feb. 6, 1979).

Amici curiae are private businesses who have brought suit pursuant to Section 4 of the Clayton Act for treble damages and injunctive relief to halt a nation-wide horizontal price fixing conspiracy on the part of the manufacturers of folding cartons, corrugated containers and consumer bags, respectively, and to compensate them for damages they have sustained as victims thereof. *Amici curiae*, as private businesses, are among the intended beneficiaries of Section 4 of the Clayton Act. *See H. R. Rep. No.* 627, 63rd Cong. 2d Sess. (1914); *S. Rep. No.* 698, 63rd Cong. 2d Sess. (1914).

They are vitally affected by the question presented in the Petition for Certiorari. In two of their three respective actions defendants have previously been convicted of criminal violations of Section 1 of the Sherman Act in indictments charging the existence of horizontal price fixing conspiracies. *See United States v. Consolidated Packaging Corporation*, 575 F. 2d 117 (7th Cir. 1978) (folding cartons); *United States v. Continental Group, Inc.*, 456 F. Supp. 704 (E. D. Pa. 1978) (consumer bags). In the third action, defendants are currently standing trial on an indictment charging a horizontal price fixing conspiracy, which trial may result in criminal judgments of convictions. *United States v. International Paper Co., et al.*, Criminal No. 78-H-11 (S. D. Texas) (corrugated containers). *Amici curiae* seek to assert, and should be entitled to assert, the collateral estoppel effect of final judgments of conviction under the federal common law of collateral estoppel. The decision of the United States Court of Appeals for the Seventh Circuit for which a Writ of Certiorari is presently sought erroneously denies *amici curiae* any possibility for collateral estoppel use of the facts found by the juries which convicted or which might convict defendants of the very acts upon which amici have sued those same defendants. In the *Folding Cartons Antitrust Litigation* that decision is controlling authority. On February 16, 1979, Judges Robson and Will entered an Order foreclosing collateral estoppel in the *Folding Carton* litigation because of *Illinois v. General Paving*. In the *Corrugated Containers Antitrust Litigation* and the *Hedges Enterprise* case, *Illinois v. General Paving* is the only appellate precedent directly on point to which district courts may look for guidance, if not instruction. The Seventh Circuit's decision in *Illinois v. General Paving* will have vast implications nationwide for private enforcement of the antitrust laws.

B. ARGUMENT.

The Seventh Circuit, in *Illinois v. General Paving*, has ruled upon an extremely important federal question in a manner that directly conflicts with the rule for determining when a federal statute has preempted the federal common law, enunciated by the Court in *Illinois v. City of Milwaukee*, 406 U. S. 91, 101-07 (1972). It also conflicts with the language, history and policies of the antitrust statutes, and with the *Parklane Hosiery* decision, *Parklane Hosiery v. Shore*, 99 S. Ct. 645 (1979). For these reasons, the Petition for a Writ of Certiorari should be granted.

1. The Seventh Circuit Did Not Correctly Address the Central Issue Presented of Whether a Federal Statute Has Actually Preempted the Federal Common Law.

The legal issue presented is whether a federal statute has preempted the federal common law. The statute in question is § 5(a) of the Clayton Act, 15 U. S. C. § 16(a). The federal common law is the doctrine of collateral estoppel, as clarified most recently by *Parklane Hosiery v. Shore*, 99 S. Ct. 645 (1979).

The United States Court of Appeals for the Seventh Circuit recognized that the issue of statutory preemption of federal common law had been presented. ". . . Section 5(a) was intended to preempt the common law of collateral estoppel." *Illinois v. General Paving*, Appendix A to Petition for a Writ of Certiorari at A-6 n. 4.

However, in deciding that issue, the Court of Appeals did not purport to apply, and did not in fact apply the rule enunciated by this Court for determining when federal common law has been preempted by a federal statute. The Court of Appeals' decision of preemption is in the strongest possible conflict with the most recent decision by the Court on the question of federal common law preemption, *Illinois v. City of Milwaukee*, 406 U. S. 91 (1972).

In *Illinois v. Milwaukee, supra,* at issue was whether the federal common law of nuisance abatement had been preempted by the Federal Water Pollution Control Act. The Court unanimously held there had been no such preemption:

> The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 457, 1 L. Ed. 2d 972, 981, 77 S. Ct. 912.

406 U. S. at 103. *See id.* at 107.

The correct focus for determining preemption, according to *Illinois v. Milwaukee, supra,* is whether the federal common law and the federal statute are "inconsistent" with each other. *Id.* at 104. The Court in *Illinois v. Milwaukee* found no inconsistency in application, and held that the federal common law remedy supplemented and complemented the statutory one. *See* the similar analysis in *Aronson v. Quick Point Pencil Co.*, 47 U. S. L. W. 4219, 4221 (U. S., Feb. 28, 1979), (no actual conflict between federal patent law and private royalty contract, hence no preemption).

The Seventh Circuit in *General Paving* never addressed the question whether, under *Illinois v. City of Milwaukee,* the federal common law of collateral estoppel and the statutory prima facie use provision are "inconsistent" with each other. Had it done so, it would have had to conclude that there is no inconsistency. Quite the contrary, the two uses supplement each other. Offensive collateral estoppel is generally applicable under the common law, upon consideration of the factors outlined by the Court in *Parklane Hosiery v. Shore, supra.*[1]

Whenever the *Parklane Hosiery* factors are not met and a trial court declines to permit application of collateral

1. Those factors are whether the party seeking to assert collateral estoppel could have joined in the prior proceeding, whether the party sought to be estopped had the incentive and opportunity to litigate the issue vigorously in the prior proceeding, whether the prior proceeding rendered a decision that was itself inconsistent with any earlier decisions in other forums, and whether the party sought to be estopped would have greater procedural opportunities to litigate the issue in the second proceeding than in the first. 99 S. Ct. at 648 n. 1.

estoppel—or when a party for strategic reasons finds it preferable to introduce evidence on all the issues, rather than having some of them precluded from re-litigation by estoppel—15 U. S. C. § 16(a) provides for according prima facie weight to a prior judgment.

Thus the common law and the statute complement each other, each filling a vital, non-duplicative and assuredly non-mutually-exclusive role in the private enforcement of the antitrust laws.

The central question of the proper legal standard for preemption was not considered by the Seventh Circuit Court of Appeals.

2. Statutory Preemption Creates a Discriminatory, Irrational, and Arbitrary Impact on Courts and Litigants.

The Seventh Circuit did not analyze the consequences of its finding of statutory preemption of the common law. Had it done so, it would have realized that preemption by § 16(a) will cause an irrational and arbitrary system of piecemeal preclusion, estoppel and litigation, which furthers no purpose of Congressional statute or judicial policy.

The Seventh Circuit decision held for statutory preemption of collateral estoppel to the extent that the statute authorizes *prima facie* use. The federal common law must still apply to all matters not statutorily preempted.

Section 16(a) is specific. It controls only the subsequent use of (1) a judgment obtained by the United States Government; (2) which has been obtained pursuant to the Sherman Act, the Clayton Act, or parts of the Wilson Tariff Act of 1914 and an amendment thereto [these are the exclusive "antitrust laws" of 15 U. S. C. § 16(a) as defined in 15 U. S. C. § 12, *see Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, 375 (1958)]; (3) which is subsequently sought to be used by another party in an

action pursuant to the Sherman Act, the Clayton Act, or parts of the Wilson Tariff Act of 1914 and an amendment thereto, the same "antitrust laws." The Court has noted the extremely selective nature of this definition of "antitrust laws". *Nashville Milk, supra* at 376 n. 4.

Therefore, under the Seventh Circuit's formulation, there is *one* circumstance in which collateral estoppel is categorically forbidden: a Government-obtained judgment under the three "antitrust laws" sought to be used by another party in a subsequent action also brought under the "antitrust laws." There are many other circumstances when there will be *no* preemption, because 15 U. S. C. § 16(a) can not apply, and common law collateral estoppel will be available under *Parklane Hosiery.*

For example, if a party *other* than the Government obtains the judgment in the first proceeding, there would be no preemption of the federal common law, because 15 U. S. C. § 16(a) only applies to judgments initially obtained by the Government. *See, e.g.*, the Court's decision in *Lawlor v. National Screen Service Corp.*, 349 U. S. 322 (1955), which considered at length the application of common law res judicata and collateral estoppel to a private antitrust action not brought by the Government. The Court assumed collateral estoppel and res judicata were available and not preempted.

Similarly, if the Government obtains a judgment under *another* statute besides the specific "antitrust laws," there would be no preemption, and the common law of collateral estoppel would apply, even though the second proceeding was itself based on the "antitrust laws." The most glaring such possibility would be an administrative finding by the Federal Trade Commission in a proceeding under § 5 of the F. T. C. Act, 15 U. S. C. § 45, that defendants had committed an unfair trade practice by conspiring to restrain trade or to fix prices. That finding, not

made under an "antitrust law," would estop relitigation of the issue in a private treble damage action. Under the Seventh Circuit rule, an identical criminal judgment finding could not be so used.

Identically, a prior Government judgment under the "antitrust laws" would be available to plaintiffs for collateral estoppel in any action under any law *other than* the federal "antitrust laws." For example, private plaintiffs could collaterally estop defendants from contesting the fact of their conspiracy on pendent state law counts in federal treble damage litigation. It is senseless to preclude estoppel on a private plaintiff's § 4 claims, while permitting estoppel on state law claims in the same action. These cases follow because 15 U. S. C. § 16(a) can only apply—and only preempt under *General Paving*—if *both* actions are pursuant to the "antitrust laws."

Ironically, the one situation categorically excluded from collateral estoppel under the *General Paving* decision —a Government judgment under the "antitrust laws" used by a subsequent party in a suit under the "antitrust laws" —is the one in which Congress actually sought to assist private litigants, not place them at a severe disadvantage. Moreover, it is precisely in the circumstance of a prior Government conviction, such as in *General Paving*, that the indicia of fairness and reliability for collateral estoppel effect under *Parklane Hosiery* are most likely to be present. See note 1 *supra*. It will almost always be a prior proceeding in which no private party could have joined. It will often have been a criminal proceeding, involving a great incentive to litigate[2] and a high standard of proof. To exclude categorically these actions disserves enforcement of the antitrust laws, and frustrates both the intended

2. Violations of the antitrust laws are now felonies carrying severe sentences of imprisonment and heavy fines. 15 U. S. C. § 1 (1978 Supp.)

effect of 15 U. S. C. § 16(a), and the policy of sparing the Federal Courts from needless relitigation of matters that have already been fully and fairly litigated.

3. The Seventh Circuit Erred in Deciding Congress Intended to Preempt Federal Common Law.

Instead of focusing on the inconsistency, or lack thereof, under *Illinois v. City of Milwaukee, supra,* between the federal common law and statutory provisions, the Seventh Circuit inferred that Congress intended to preempt the common law by passing 15 U. S. C. § 16(a). In this conclusion, the Court of Appeals seriously erred.

The statutory history of 15 U. S. C. § 16(a) contains not one shred of evidence of Congressional intent to displace, preempt, or repudiate the common law. See S. *Rep.* No. 698, 63rd Cong. 2d Sess. 10 (1914); *H. R. Rep.* No. 627, 63rd Cong. 2d Sess. 14 (1914); 51 Congressional Record 13851, 13853-57, 16276, 13900 (1914). The language of the statute enacted in 1914 does not state that it is intended to preempt the common law. Nor do the words or history of any amendments to § 16(a) that have been enacted since 1914.

There is simply no evidence that either the Congress which enacted 15 U. S. C. § 16(a), or any subsequent Congress which amended the statute, desired to foreclose common law developments and common law remedies that would evolve over time to become available to litigants in federal court. Without such evidence, there is no plausible basis for finding a Congressional intent to preempt the common law. This issue has been extensively addressed in the Petition for Certiorari, pp. 19-21.

Quite the contrary, the history of 15 U. S. C. § 16(a) and its amendments display the strong Congressional interest in *benefiting* private antitrust litigants. *See H. R. Rep.* No. 627, and S. *Rep.* No. 698, 63rd Cong. 2d Sess.

1914. The effect of *Illinois v. General Paving* frustrates this policy by placing a discriminatory burden on antitrust plaintiffs, *a burden not shared by any other class of private plaintiffs in the federal courts:* the *per se* unavailability of any collateral estoppel benefit from a prior judgment which the United States Government has obtained.

4. The Seventh Circuit Misconstrued the Proper Role of the Federal Judiciary.

The Seventh Circuit concludes its decision as follows: "If the *prima facie* evidence standard of Section 5(a) is to be changed, it is for Congress to do so." Appendix A to Petition for Writ of Certiorari at A-8. This conclusion begs the question. Obviously only Congress can change a statute. That has nothing to do with whether the federal judiciary, in the exercise of sound discretion, should apply existing and recognized judicial doctrines such as collateral estoppel where such common law remedies are independent of any statute. "The remedies which Congress provides are not necessarily the only federal remedies available." *Illinois v. City of Milwaukee, supra,* 406 U. S. at 103. Hence the premise for the Seventh Circuit's decision was incorrect.

C. CONCLUSION.

For the foregoing reasons, *amici curiae* respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1464

STATE OF ILLINOIS,

Petitioner,

vs.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA, AS *AMICI CURIAE*

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
INTEREST OF AMICI CURIAE	2
REASONS FOR GRANTING THE WRIT	3
I. The Decision Of The Seventh Circuit Adds Unnecessary Complexity And Duration To Antitrust Litigation	3
II. The Decision Of The Seventh Circuit Misinterprets The Congressional Intent In Enacting Sections 4 and 5(a) Of The Clayton Act And Unnecessarily Curbs The Complementary Relationship Of Statutory Law And Common Law	7
A. Congressional Intent	7
B. Section 5(a) And Common Law Collateral Estoppel Are Complementary	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Bill Minielli Cement Contracting, Inc. v. *Richter Concrete Corp.*, 62 F.R.D. 381 (S.D.Ohio 1973)	5
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971)	5
Butler v. *Stover Brothers Trucking Co.*, 546 F. 2d 544 (7th Cir. 1977)	3
Fleer Corp. v. *Topps Chewing Gum, Inc.*, 415 F. Supp. 176 (E.D.Pa. 1976), *appeal dismissed*, (3rd Cir.), *cert. denied*, —U.S.—, 98 S. Ct. 1611 (1978)	9
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968)	3
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977)	3
In re Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971)	2
In re Gypsum Antitrust Cases, Civil No. 46414-A (N.D.Cal., Dec. 22, 1971)	5
J. I. Case Co. v. *Borak*, 377 U.S. 426 (1964)	8
J. M. Woodhull, Inc. v. *Addressograph-Multigraph Corp.*, 62 F.R.D. 58 (S.D. Ohio 1974)	5
Lippa's, Inc. v. *Lenox, Inc.*, 305 F. Supp. 182, (D.Vt. 1969)	6
Loew's, Inc. v. *United States*, 339 U.S. 974 (1950)	4
McCook v. *Standard Oil of California*, 393 F. Supp. 256 (C.D.Cal. 1975)	9
Moragne v. *States Marine Line*, 398 U.S. 375 (1970)	8
Nashville Milk Co. v. *Carnation Company*, 355 U.S. 373, (1958)	5

	Page
Parklane Hosiery Co. v. *Shore*, —U.S.—, 99 S. Ct. 645 (1979)	3, 4, 5
Plunkett v. *C.I.R.*, 465 F. 2d 299 (7th Cir. 1972)	3
Shaw v. *North Penn. R. Co.*, 101 U.S. 557 (1880)	8
United States v. *Consolidated Packaging Corporation*, 575 F. 2d 117 (7th Cir. 1978)	4
United States v. *IBM*, 786 Antitrust & Trade Reg. Rep. (BNA) (1976)	4
United States v. *Paramount Pictures*, 334 U.S. 131 (1948)	4
Y & Y Popcorn Supply Co. v. *ABC Vending Co.*, 263 F. Supp. 709 (E.D.Pa. 1967)	6
Rules	
Advisory Committee Note, Fed. R. Evid. 803 (22)	8
Hearings	
Hearings on H.R. *7905* (H.R. *8763*) *Before the Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary*, 81st Cong., 2d Sess., sec. 14, pt. 5 (1950)	3
Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Jud., 95th Cong. 1st Sess. 344 (1977)	6
Congressional Record	
21 Cong. Rec. 2612-3149	7
51 Cong. Rec. 9200	7
51 Cong. Rec. 13853	7
51 Cong. Rec. 15939	7
51 Cong. Rec. 16058	7

PAGE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1464

STATE OF ILLINOIS,

Petitioner,

vs.

GENERAL PAVING COMPANY and F. F. MENGEL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA, AS *AMICI CURIAE*

This brief *amici curiae* is submitted by Thirty-Eight States pursuant to Rule 42(4) of the Rules of this Court.

QUESTION PRESENTED

IS THE EXERCISE OF THE COMMON LAW DOCTRINE OF COLLATERAL ESTOPPEL PREEMPTED BY THE PRIMA FACIE EVIDENTIARY STANDARD GRANTED AS A BENEFIT TO PRIVATE ANTITRUST PLAINTIFFS UNDER SECTION 5(a) OF THE CLAYTON ACT?

INTEREST OF AMICI CURIAE

The amici States are keenly interested in this proceeding because their Attorneys General are authorized and required by law to protect their citizens from the economic plunder of violators of the laws which establish free and open competition as a national policy. The decision of the Seventh Circuit significantly hinders the ability of the States to recover treble damages from antitrust violators in a judicially approved and efficient manner. The States, which rely in the first instance on their taxpayers to pay artificially high prices to antitrust violators who contract with the State, must now turn to their taxpayers a second time to pay for duplicative, lengthy and complex antitrust litigation to recover illegal overcharges. To be sure, it is the taxpayer, frequently represented in the past by State Attorneys General, *e.g., In re Antibiotic Antitrust Actions,* 333 F. Supp. 278 (S.D.N.Y. 1971), who is victimized both by the antitrust violation and by the judicial inefficiency which is caused by interpreting Section 5(a) as mutually exclusive of the doctrine of collateral estoppel.

The exclusionary reading of Section 5(a) by the Seventh Circuit creates several illogical inconsistencies in the application of the doctrine of collateral estoppel. Amici States which seek to effectively enforce the antitrust laws are placed at a disadvantage by the Seventh Circuit's construction of Section 5(a) where, as in the case presented, a prior United States Department of Justice criminal action has resulted in findings or pleas of guilt. Antitrust defendants adjudged guilty beyond a reasonable doubt will be able to relitigate their liability in a lengthy civil proceeding. States who are plaintiffs in these civil proceedings will be unable to prevent this expensive relitigation solely because they are *antitrust* plaintiffs. If these same States were plaintiffs in non-antitrust proceedings, they would be able to reap the savings which flow from the modern extension of the doctrine of collateral estoppel. *Parklane Hosiery Co.* v. *Shore,* —— U.S. ——, 99 S. Ct. 645 (1979); *Butler* v. *Stover Bros. Trucking Co.,* 546 F. 2d 544 (7th Cir. 1977); *Plunkett* v. *C.I.R.,* 465 F. 2d 299 (7th Cir. 1972).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SEVENTH CIRCUIT ADDS UNNECESSARY COMPLEXITY AND DURATION TO ANTITRUST LITIGATION.

The complex and lengthy nature of antitrust litigation is well documented by many authorities in many sources. *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968); *Hearings on H. R. 7905 (H. R. 8763) Before the Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary,* 81st Cong., 2d Sess., sec. 14, pt, 5,

12 (1950); Seminar on Protracted Cases, 21 F.R.D. 395 (1957); Note, *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial,* 43 U. Chi. L. Rev. 338 (1976).

Cases prosecuted by the United States Department of Justice include some of the most complex and lengthy. *See e.g., United States* v. *IBM,* 786 Antitrust & Trade Reg. Rep. (BNA) (1976); *United States* v. *Consolidated Packaging Corporation,* 575 F. 2d 117 (7th Cir. 1978); *Loew's, Inc.* v. *United States,* 339 U.S. 974 (1950); *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948); "Short Cuts" In Long Cases, 13 F.R.D. 41 (1951); Posner, *A Statistical Study of Antitrust Enforcement,* 13 J. Law & Econ. 365 (1970). Denying States who become civil litigants the collateral estoppel benefit of prior successful Government prosecutions will require them to again burden the federal judiciary with re-litigation of liability issues even prior to often complex proof of damages. Such a requirement is particularly illogical when compared to the operation of collateral estoppel in other contexts.

In *Parklane Hosiery Co.* v. *Shore, supra,* this Court approved the offensive use of collateral estoppel in federal civil litigation without requiring mutuality of parties. *Parklane* focused on a defendant's right to have a "full and fair" opportunity to litigate the claims against him. 99 S. Ct. at 652. Having been given one full and fair hearing, a defendant will be collaterally estopped from re-litigating the same issues in a subsequent suit brought by a third party.

Although this Court expressed reservations about the application of collateral estoppel in certain situations, 99 S. Ct. at 651, the *Parklane* decision, together with the

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation,* 402 U.S. 313 (1971), decision, fosters judicial economy by obviating the need for costly and time-consuming re-litigation of issues. There is no language in either of these cases suggesting that antitrust cases be excluded from the extension of the doctrine of collateral estoppel. On the contrary, Mr. Justice Rehnquist recognized in his dissent in *Parklane* that extension of the doctrine of collateral estoppel should reach private antitrust cases which follow Government actions. 99 S. Ct. at 662, n. 20.

In antitrust actions which are analytically different than the set of circumstances contemplated by Section 5(a), collateral estoppel will operate. When a State plaintiff first secures judgment after trial against antitrust violators, the United States Government could collaterally estop defendants in a subsequent civil antitrust action. When a private plaintiff successfully obtains a jury verdict against an antitrust defendant, a State or another civil litigant could benefit in a subsequent civil action by invoking collateral estoppel to streamline its case. *See J. M. Woodhull, Inc.* v. *Addressograph Multigraph Corp.,* 62 F.R.D. 58, 61 (S.D. Ohio, 1974); *Bill Minielli Cement Contracting, Inc.* v. *Richter Concrete Corp.,* 62 F.R.D. 381, 386 (S.D. Ohio 1973); *In re Gypsum Antitrust Cases,* Civil No. 46414-A (pretrial order dated December 22, 1971, N.D. Cal.).

The greatest incongruity of an exclusionary reading of Section 5(a) is underscored where the prior Government action is an FTC action under the Federal Trade Commission Act (FTCA). The FTCA is not, by definition, an "antitrust law" within the meaning of the Clayton Act. 15 U.S.C.A. § 3. *See Nashville Milk Co.* v. *Carnation Company,* 355 U.S. 373, 375-376 (1958). However, the FTC

may challenge anticompetitive activities either under the FTCA or under an antitrust law, such as the Sherman Act. Courts have distinguished the effects of Section 5(a) of the Clayton Act on FTC actions under the FTCA and under the Sherman Act. *Y & Y Popcorn Supply Co.* v. *ABC Vending Co.*, 263 F. Supp. 709, 711-712 (E.D. Pa. 1967); *Lippa's, Inc.* v. *Lenox, Inc.*, 305 F. Supp. 182, 186 (D. Vt. 1969). Consequently, if the Federal Government chooses to attack an unfair method of competition through the FTC and its FTCA, a subsequent private antitrust litigant could invoke the doctrine of collateral estoppel under the *Parklane* decision. On the other hand, if the Federal Government obtains a judgment by the FTC or DOJ under one of the "antitrust laws," Section 5(a) would limit a private antitrust litigant to prima facie usage of that judgment. In short, it is illogical to alter the doctrine of collateral estoppel with the name of a party plaintiff and the name of a statute under which that party sues.

The duplication and delay occasioned by re-litigation of liability issues aids only those who have already been adjudged to be in violation of the antitrust laws. Antitrust defendants maintain use of their illegal profits and ultimately pay a civil judgment in deflated dollars without interest. This is particularly significant where re-litigation of liability could take months or years. For example, IBM earns an estimated $5,000,000 to $9,000,000 in additional profit for each day the *United States* v. *I.B.M.* monopoly trial continues. *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. 344 (1977) (Opening Remarks of Senator H. Metzenbaum.) Not only is additional trial time required, but also discovery is complicated and prolonged. Especially in a time of heightened tax consciousness,

amici States are concerned over the unnecessary expenditure of tax dollars such duplicative proceedings would require.

II.

THE DECISION OF THE SEVENTH CIRCUIT MISINTERPRETS THE CONGRESSIONAL INTENT IN ENACTING SECTIONS 4 AND 5(a) OF THE CLAYTON ACT AND UNNECESSARILY CURBS THE COMPLEMENTARY RELATIONSHIP OF STATUTORY LAW AND COMMON LAW.

A.

Congressional Intent.

Section 4 of the Clayton Act was originally enacted as Section 7 of the Sherman Act in 1890. Through this Section, Congress intended that persons "injured" would be able to bring damage actions against price-fixers and not rely entirely on Government action. Much of the debate of that 51st Congress addressed the means by which procedural burdens of private litigants could be eased. *See* 21 Cong. Rec. 2612-3149.

Similarly, the enactment of Section 5 in 1914 was an attempt by Congress to ease a private plaintiff's burden to the extent then thought constitutionally permissible. *See* 51 Cong. Rec. 9200, 13853, 15939, 16058. The requirement of mutuality of parties was still a part of the doctrine of collateral estoppel and was thought to bar a House version which provided that a prior Government action be given conclusive effect in a private antitrust suit. Consequently, Congress settled on a prima facie benefit for subsequent private litigants. Petitioner State of Illinois

correctly and more completely discusses the intent of the 1914 Congress and, in the interest of judicial economy, amici will adopt that argument.

B.

Section 5(a) And Common Law Collateral Estoppel Are Complementary.

The ultimate irony of the Seventh Circuit's decision is that, by interpreting Section 5(a) as exclusionary of the common law, a statute which was intended to confer a unique benefit upon antitrust plaintiffs now acts as a burden to antitrust plaintiffs. The Seventh Circuit reaches this result by viewing Section 5(a) and the common law doctrine of collateral estoppel as disjunctive rather than complementary. Such a view is wholly unwarranted.

It is a rule of statutory construction that common law rights and remedies which are not inconsistent with a statutory scheme are preserved. *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). Statutes should not be construed as limiting these common law rights and remedies beyond the statute's express terms. *Shaw* v. *North Penn R. Co.*, 101 U.S. 557 (1880). *Cf. Moragne* v. *States Marine Line*, 398 U.S. 375 (1970). In enacting Section 5(a) of the Clayton Act, Congress did not expressly limit the common law doctrine of collateral estoppel, a rule of the substantive law of judgments. *See e.g.*, Advisory Committee's Note to Fed. R. Evid. 803 (22). On the contrary, Congress attempted to aid private antitrust plaintiffs with the prima facie benefit from the law of evidence. These two notions are not in conflict; rather, they are complementary.

The complementary nature of these concepts was alluded to by the court in *McCook* v. *Standard Oil of California*, 393 F. Supp. 256 (C.D. Cal. 1975). Without the benefit of this Court's *Parklane* decision, the Court held that the prior, non-jury FTC proceeding could not collaterally estop a defendant in a subsequent private antitrust action. In addressing the relationship of Section 5(a) to the doctrine of collateral estoppel, the Court noted that legislative history of Section 5(a) suggested that:

> . . . Congress only intended to set a minimum standard for the effect of prior government antitrust judgments, thereby leaving the courts free to apply in accord with constitutional limitations any common law doctrine which would increase the effect of the prior judgment beyond the prima facie evidence standard.

393 F. Supp. at 259.

In denying for other reasons a defendant's motion to collaterally estop a private plaintiff from pleading a prior FTC ruling, another district court anticipated the irony of the Seventh Circuit's opinion by observing:

> It seems odd that a statutory provision which was enacted to strenghen antitrust plaintiffs should now be interpreted to make them worse off in many cases than they would have been without the enactment.

Fleer Corp. v. *Topps Chewing Gum, Inc.*, 415 F. Supp. 176, 185 (E.D. Pa. 1976), *appeal dismissed*, (3rd Cir.), *cert. denied* —— U.S. ——, 98 S. Ct. 1611 (1978).

CONCLUSION

Because of the importance of the question presented for the efficient enforcement of the antitrust laws in the United States and by the several States, and because of the unwarranted emasculation of the doctrine of collateral estoppel as applied to antitrust plaintiffs, the petition of the State of Illinois for writ of certiorari to the Seventh Circuit Court of Appeals should be granted.

Respectfully submitted,

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